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No. 93-373

In The

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD AND THE STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an injunction that prevents the Englewood Cliffs school district's students from attending any public high school other than Dwight Morrow High School in the wholly-separate Englewood school district violate the equal protection rights of the students guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution, where the injunction, which deprives the Englewood Cliffs students of educational choices available to all other students in the State, is a race-conscious interdistrict remedy to alter the *de facto* racial balance of Dwight Morrow High School, there had been no discrimination by the Englewood Cliffs Board of Education or its students, and they did not cause Dwight Morrow High School's purported racial imbalance?

2. Did denial of the Englewood Cliffs school district's application for severance of its sending-receiving relationship with Dwight Morrow High School in the wholly-separate Englewood School district violate the equal protection rights of the Englewood Cliffs' students guaranteed by Section 1 of the Fourteenth Amendment where the denial was a race-conscious effort to alter the *de facto* racial balance of Dwight Morrow High School, there had been no proof of discrimination on the part of the Englewood Cliffs Board of Education or its students and they did not cause Dwight Morrow High School's purported racial imbalance ?

3. Did the New Jersey courts err in failing to apply strict scrutiny to the above-described race-conscious injunction and denial of severance?

4. Did the New Jersey courts err in finding under the circumstances of this case that the goal of achieving greater "diversity" in the student body at Dwight Morrow High School constitutes a compelling state interest which justified the foregoing race-conscious actions?

5. Were either the injunction or the denial of severance of the sending-receiving relationship necessary and narrowly tailored to achieving greater "diversity" at Dwight Morrow High School under the circumstances of this case, including the large white school-age population within the Englewood district itself that could attend its high school but does not choose to do so?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the Supreme Court of New Jersey were the Board of Education of the Borough of Englewood Cliffs, the Board of Education of the Borough of Tenafly, the Board of Education of the City of Englewood, and the State Board of Education of the State of New Jersey.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceedings Below	iii
Table of Contents	iv
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	3
A. Procedural History and Presentation of the Constitutional Issues Below	3
B. Conditions in the Districts	7
Reasons for Granting the Writ	9
I. There is no constitutional wrong or interdistrict effect to justify the State's allegedly remedial race-based action	11
II. The State Board's race-based action is subject to strict scrutiny under the Fourteenth Amendment	18

Contents

Page

III. No compelling state interest exists, nor are the State's alleged remedies narrowly tailored 21

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Board of Education, Los Angeles v. Superior Court, 448 U.S. 1343 (1980) 10, 23

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 10, 13, 14, 16, 17, 19

Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977) 12

Englewood Cliffs v. Englewood, 132 N.J. 327, 625 A.2d 482 (1993) 1

Englewood Cliffs v. Englewood, 257 N.J. Super. 413, 608 A.2d 914 (App. Div. 1992) 1

Estes v. Metropolitan Branch, Dallas NAACP, 444 U.S. 437 (1980) 16

Freeman v. Pitts, __ U.S. __, 112 S. Ct. 1430 (1992) 12, 16, 18

Jenkins by Agyei v. State of Missouri, 855 F.2d 1295 (8th Cir. 1988), *rev'd on other grounds,* 495 U.S. 33 (1990) 24

Contents

Page

Milliken v. Bradley, 418 U.S. 717 (1974) . . 4, 7, 10, 15, 16, 17, 20

Milliken v. Bradley, 433 U.S. 267 (1977) 10, 17

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 19

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 12, 13, 16, 19, 21

Shaw v. Reno, __ U.S. __, 113 S. Ct. 2816 (1993) . . . 19, 20, 21, 22

Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972) 10

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. (1971) 16

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 12

Washington v. Davis, 426 U.S. 229 (1976) 12

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 13, 16, 19

Statutes Cited:

N.J.S.A. 18A:38-3 . . . . . 2, 4, 7, 9

N.J.S.A. 18A:38-13 . . . . . 2, 8

Contents

Page

28 U.S.C. § 1257(a) 1

United States Constitution Cited:

Fourteenth Amendment, Section 1 .....
.....i, 1, 6, 9, 10, 12, 15, 18, 19, 24

APPENDIX

Appendix A — *Per Curiam* Opinion of the Supreme Court of New Jersey, Dated June9, 1993 ..... 1a

Appendix B — Decision of the Superior Court of New Jersey, Appellate Division, Dated June 15, 1992 ..... 5a

Appendix C — Decision and Order of the New Jersey State Board of Education, Dated April 4, 1990 and April 5, 1990 ..... 90a

Appendix D — Decision of the New Jersey Commissioner of Education, Dated July11, 1988 ..... 146a

Appendix E — Decision of the Honorable Kenneth L. Springer, Administrative Law Judge, Dated April 18, 1988 ..... 197a

OPINIONS BELOW

The opinion of the New Jersey Supreme Court in this matter (Appendix A hereto) is reported at *Englewood Cliffs v. Englewood*, 132 N.J. 327, 625 A.2d 482 (1993). The opinion of the Superior Court of New Jersey, Appellate Division in this matter (Appendix B hereto) is reported at *Englewood Cliffs v. Englewood*, 257 N.J. Super. 413, 608 A.2d 914 (App. Div. 1992).

STATEMENT OF JURISDICTION

On June 9, 1993 the Supreme Court of New Jersey rendered its decision affirming the decision below of the Superior Court of New Jersey, Appellate Division. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), as the petition seeks review of a final decision of the highest court of the State of New Jersey which violates Section 1 of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J.S.A. 18A:38-3:

> Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.

N.J.S.A. 18A:38-13:

> No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law, shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition

of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.

STATEMENT OF THE CASE

A. Procedural History and Presentation of the Constitutional Issues Below

On December 23, 1985 the Board of Education of the Borough of Englewood Cliffs ("Cliffs") petitioned the Commissioner of Education pursuant to N.J.S.A. 18A:38-13 to terminate a sending-receiving relationship with Englewood's Dwight Morrow High School ("DMHS") that had been established voluntarily in 1967. Pa1.[1] The sending-receiving relationship is a contractual arrangement whereby Cliffs, which does not have a high school, sends its public high school students to Englewood's high school, DMHS. (Cliffs' students in grades K-8 attend public elementary and intermediate schools in Englewood Cliffs.) The Englewood Board of Education ("Englewood") opposed this petition contending, *inter alia*, that maintenance of the sending-receiving relationship was necessary to maintain an appropriate racial balance at DMHS. Pa27. Englewood also cross-petitioned to enjoin the Board of Education of the Borough of Tenafly ("Tenafly") from accepting Cliffs' and Englewood's students at

1. Citations to "Pa" are to pages in the Cliffs Appendix on Appeal to the Appellate Division, while citations to "Cpa" are to the Additional Appendix submitted on the consolidated appeal to the Appellate Division. Citations to the transcript of the hearing before the Administrative Law Judge are denominated by the hearing date, followed by "T" followed by the relevant pages and lines, *e.g.*, 1/13T8:12-9:13. Citations to the Appendix to this Petition are denominated by a page number followed by "a", *e.g.*, 58a.

Tenafly High School ("THS")[2] on a tuition basis, and to compel regionalization of DMHS and THS for the explicit purpose of altering the racial balance at DMHS.

A 99-day hearing was held before an Administrative Law Judge ("ALJ"). 202a. At the time the ALJ rendered his decision, only 21 students from Cliffs attended DMHS. Of these 21, 15 were white. Their withdrawal would have decreased the white student percentage at DMHS by only 1.6%. 244a-245a; Pa925, 931. DMHS' student population was, overall, approximately 11.8% white and 66.2% black. The student population of Englewood's elementary schools (as to which neither Cliffs nor Tenafly had any connection) was approximately 6.75% white and 68% black. However, Englewood's own *school-age* population was approximately 37% white and 48% black. Thus, Englewood's own school-age whites were abandoning its schools in numbers far more significant than the few Cliffs' students could begin to correct. Pa925-929; 118a-119a. In post-hearing submissions prior to the ALJ's Initial Decision, the cross-respondents questioned whether an order granting Englewood's cross-petition for an injunction against Tenafly accepting Cliffs' students would violate the Fourteenth Amendment, on the grounds, *inter alia*, that it would violate the holding of *Milliken v. Bradley*, 418 U.S. 717 (1974) ("*Milliken I*"). *See* Tenafly Brief in Opposition to the Cross-Petition of Englewood, December 11, 1987, at 77-83.

The ALJ rendered an Initial Decision (Appendix E hereto) enjoining THS from accepting Cliffs' students on a tuition basis, unlike students it was accepting from the rest of the State, and denying Cliffs' severance request, because of the effect it allegedly would have on racial balance at DMHS. 284a. In doing so, the ALJ

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2. In 1982 THS established a policy pursuant to N.J.S.A. 18A:38-3, as many other public high schools had, allowing students from outside its district to attend THS on a tuition basis.

did not address the Fourteenth Amendment arguments. The ALJ acknowledged that Cliffs' petition for severance had been motivated by good faith educational concerns, found that DMHS' racial imbalance resulted from *de facto* conditions, and further found that neither Cliffs nor Tenafly practiced any intentional segregation. 228a-229a, 251a-252a, 132a. The ALJ also recognized that "white enrollment at DMHS ... is disproportionately low compared to the number of school-aged whites ... living in Englewood", that "DMHS would be much better integrated if more whites from within the district chose to attend the public school system", and that Englewood "possesses the means to keep its students in its own school by raising educational standards." 205a, 235a. The ALJ also denied Englewood's request for forced regionalization.

The Initial Decision was then presented to the Commissioner of Education for review. The Commissioner issued a decision (Appendix D hereto) that affirmed the Initial Decision. 226a-227a. The Commissioner addressed only in passing the federal equal protection arguments, 181a, 184a-185a, 187a, which had been raised by way of exceptions to the Initial Decision. Tenafly's Exceptions to Initial Decision, May 9, 1988, at 37-41.

Cliffs appealed the Commissioner's decision to the State Board of Education and asserted, among other grounds, that the injunction would violate the Fourteenth Amendment's equal protection guarantee. *See* Cliffs' Brief on Appeal to the New Jersey State Board of Education, September 23, 1988, at 30-33 and Reply Brief, December 12, 1988, at 22-23. However, the ALJ's and Commissioner's findings were affirmed with modifications by the State Board of Education in its April 4, 1990 Decision and April 5, 1990 Order. *See* Appendix C hereto. The Decision and Order expanded the injunction against Tenafly's acceptance of Cliffs' students so as to prohibit Cliffs' or Englewoods' students attending any public high school other than DMHS. The State Board rejected

Cliffs' argument that the Fourteenth Amendment limited the State's authority to take affirmative action, such as the injunction, to counteract conditions of *de facto* segregation. 124a, 133a.

On May 17, 1990 Cliffs filed an appeal with the Superior Court of New Jersey, Appellate Division, as to all portions of the State Board's Decision except the denial of regionalization. Pa287. On May 18, 1990 Englewood filed a cross-appeal with respect to the State Board's Decision denying regionalization. Pa289. (The Appellate Division later granted a motion by Cliffs and Tenafly for leave to appeal a subsequent resolution adopted by the State Board to undertake a study of regionalization of various districts in Bergen County in the interim, and consolidated this appeal with the main appeal. CPa 82-84.) In its Brief on Appeal to the Appellate Division, October 1, 1990, at 23-50, Cliffs addressed the federal equal protection claims asserted here in detail. Cliffs argued that both the State's injunction and the failure to grant severance, under the circumstances of this case, violate the Fourteenth Amendment rights of the Cliffs' students. The Cliffs Brief highlighted, *inter alia*, the failure of the State to show the discriminatory intent and *inter*district effect that are necessary for a race-based *cross*-district remedy, the need for the courts to apply the strict scrutiny test to the actions taken in this case, and the State's failure to show that its denial of severance and the injunction served compelling interests, or that those steps were "necessary" or "narrowly tailored" to achieving the government's interest.

On June 15, 1992 the Appellate Division issued its Decision (Appendix B hereto) affirming the Decision and Order of the State Board. The Appellate Division rejected all of Cliffs' constitutional arguments. It stated that the State's actions, primarily in denying severance, were not subject to strict scrutiny, but that even if they were, those actions were necessary to serve a compelling state interest in "diversity" in education, and were narrowly tailored to that goal. Moreover, the Appellate Division held that the State was

not constrained by *Milliken I* and other decisions of this Court, which it asserted only served to limit the power of federal courts to remedy *de facto* segregation. 68a-77a. The Appellate Division did not separately consider the federal constitutional issues that had been raised as to the injunction.

Cross-petitions for certification to the New Jersey Supreme Court were filed and granted. Cliffs once again raised the constitutional arguments set forth herein. Cliffs' Petition for Certification, July 15, 1992, at 14-16. The Supreme Court issued a Decision on June 9, 1993 (Appendix A hereto) that affirmed the State Board's actions substantially for the reasons stated by the Appellate Division.

B. Conditions in the Districts

This case starts and ends not in Cliffs but in Englewood. It is uncontroverted that any alleged racial imbalance at DMHS would be corrected if Englewood would attract a greater part of its own substantial white and Asian school-age population. 204a-205a, 118a-119a; Pa779, 860, 925-929, 1209, 1213, 1215, 1250, 1266, 1272, 1278. Englewood has consistently failed to do so. It maintains a *de facto* segregated school system in grades K-8 (6.75% white and 68% black), a situation which Cliffs obviously did not create. Pa925-929, 1447, 1448. Englewood has at all times had the ability to take steps on its own to attract a more diverse student body to DMHS. None have been attempted. Instead, Englewood has insisted upon enjoining Cliffs' students from an important educational opportunity open to every other citizen of the State pursuant to N.J.S.A. 18A:38-3, upon maintaining an involuntary, unsatisfactory and unproductive sending-receiving relationship with Cliffs, and upon seeking involuntary annexation of Cliffs' and Tenafly's districts.

Cliffs finds itself in this position solely because in 1967 it

began a voluntary, 10-year contractual sending-receiving relationship with Englewood. 1/7T100-101; Pa511. When that expired, the relationship continued pursuant to statute. N.J.S.A. 18A:38-13. By the early 1980s, Cliffs had many legitimate concerns, grievances and dissatisfactions with DMHS which ultimately led to Cliffs' petition for severance. *See* 1/14T151-154; 1/21T195-196; 1/13 (pm) T59, 69-71; 6/15T37-40; 1/15T169-171. Cliffs sought the withdrawal to establish what it hoped would be a more satisfactory relationship with Tenafly that it found, and the ALJ agreed, would better suit the educational needs of the majority of Cliffs' students. 228a. Cliffs asserted that severance would not result in "substantial negative impact" to either Englewood or Cliffs. *See* N.J.S.A. 18A:38-13.

Cliffs' choice should not have been controversial. The ALJ found it based on good faith educational judgments. 228a-229a. He agreed that the proposed new relationship would indeed better serve the needs of most Cliffs' students. 228a. The evidence showed that Cliffs' students were not attending DMHS and that they could not be compelled to do so. The THS tuition plan had no demonstrable effect upon enrollment at DMHS. Rather, Cliffs' parents rejected DMHS, *then* canvassed available public *and* private school options, and *then* selected THS or a private school as best for their individual children. 9/11T20-28; 3/24T50-59, 63-64; Pa607, 620; 9/11T28-29; 9/30T233-234; 255a-256a; Pa617. The ALJ further agreed that severance would have no adverse effect on financing, course offerings or facilities utilization at DMHS. 244a-246a, 248a-249a, 250a.

The petition for severance only became controversial because Englewood and the State Board made race the sole touchstone of their argument and Decision, respectively. All the benefits of severance and statutorily authorized choice, now precluded by the injunction, were sacrificed to prevent the purported "racial impact" of permitting severance — the withdrawal of only 21

students, affecting only a 1.6% change in the white student percentage at DMHS. That "impact" was so *de minimus* that the State Board had to reach back to the beginning of the Tenafly tuition policy in 1982 to attempt to discover a purported racial impact. 121a-123a. Severance was denied — and the injunction entered purportedly in aid of that determination — because had Cliffs sought withdrawal in 1982, it allegedly would have caused a *6%* decrease in the white student percentage at DMHS rather than only a *1.6%* decrease in 1987-1988. 97a-98a, 121a-123a. Instead, the *facts* are these: (1) withdrawal was *not* sought by anyone in 1982; (2) Cliffs and Tenafly were found by the ALJ to have acted without any discriminatory purpose or intent whatsoever (228a-229a, 251a-252a); (3) the alleged "white flight" by Cliffs' students was actually dwarfed by changes in Englewood's students' own enrollment patterns over which Cliffs could have no control[3]; and (4) DMHS would have remained diverse whether severance was granted in 1982 or 1987. *See* pp. 21-23, *infra.*

REASONS FOR GRANTING THE WRIT

The order of the State Board, as affirmed by the Appellate Division and the final judgment of the New Jersey Supreme Court, deprives Cliffs' students of their rights under the Fourteenth Amendment. Specifically, the injunction denies Cliffs' students, solely on the basis of race, the opportunity accorded by N.J.S.A. 18A:38-3 to all other students throughout the State to attend any public high school on a tuition basis, and therefore should be held to violate the equal protection guaranty, whether or not severance should have been granted. The denial of severance similarly turned

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3. Englewood contends that its students chose not to attend DMHS due to religious convictions or preferences for private schools. Whatever the cause, Englewood's withdrawals account for more than two-thirds of the change in the white student population at DMHS from 1982 to 1987-1988. Pa925-929; 118a-119a.

upon the race of Cliffs' students and, under the circumstances of this case — where the impact of the proposed severance was *de minimus*, Cliffs and its students were innocent of any wrongdoing, and Englewood's problems could be remedied, and could only be remedied, from within its district — the denial of severance also violated their equal protection rights.

This Court has consistently held that the Fourteenth Amendment does not authorize States to deprive innocent districts and their citizens of rights in order to address *de facto* conditions elsewhere. *See, e.g., Milliken I, supra.* This Court has previously found New Jersey's school districting to be race-neutral and that any *de facto* segregation in New Jersey school districts did not violate the Fourteenth Amendment. *Spencer v. Kugler,* 326 F.Supp. 1235 (D.N.J. 1971) (three-judge panel), *aff'd mem.*, 404 U.S. 1027 (1972). *See also, Milliken v. Bradley,* 433 U.S. 267, 280 n. 14 (1977) ("*Milliken II*"). The Fourteenth Amendment prohibits the State's introduction of race-conscious classifications where race heretofore has played no part. *See, City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 504 (1989) ("*Croson*"). Cliffs respectfully submits that this Court should accept certiorari to vindicate its prior holdings and address the important issue at the heart of this matter, an issue encountered nationwide: may States cross race-neutral district lines to alter *de facto* racial composition in another district?

In the chambers opinion in *Board of Education, Los Angeles v. Superior Court,* 448 U.S. 1343, 1348 (1980) (emphasis added), Chief Justice Rehnquist questioned the basis for such state action to counteract *de facto* segregation:

> . . . Because projections indicated that the school district in 1987 will consist of only 14% white students, the Superior Court asserted that its task was to achieve *the optimal use of white students* in the schools so that the maximum

number of schools may be desegregated.

> *I find this analysis somewhat troublesome, since it puts "white" students much in the position of textbooks, visual aids, and the like — an element that every good school should have.*

The Chief Justice's concern is implicated directly in this case. New Jersey has reached outside the traditional municipal school district, Englewood, which has its own means to solve any racial imbalance "problem," refused to allow Cliffs to sever its relationship with DMHS and enjoined Cliffs' students from going to any other public high school in the State, as all other New Jersey students are allowed to do. This was done *because* Cliffs' students are predominantly white and Asian and the State views them as tools to achieve a more desirable racial balance at DMHS. Yet, (1) the racial balance of DMHS exists *de facto*, not as the result of *de jure* segregation; (2) the Cliffs' student population is insufficient to remedy DMHS's perceived problems; (3) Cliffs' students attend schools other than DMHS for valid educational reasons; and (4) Englewood itself has the capacity to create a racially balanced environment at DMHS, if it would attract its own students. Under these circumstances, this Court should now clearly articulate that the asserted "need" for white students in Englewood does not permit the State to deny Cliffs' students opportunities open to others similarly situated.

I.

THERE IS NO CONSTITUTIONAL WRONG OR INTERDISTRICT EFFECT TO JUSTIFY THE STATE'S ALLEGEDLY REMEDIAL RACE-BASED ACTION

The state courts made a wrong turn from the outset by utilizing

race-conscious school assignments, *i.e.* forcing Cliffs to remain in a relationship with DMHS and enjoining Cliffs' students from attending any public high school in New Jersey other than DMHS because of their race, when race had played no role in creating the conditions at DMHS the State sought to remedy. Transient population changes, school preferences, and other such factors will not justify the State's actions here to set aside guaranteed rights, and disadvantage Cliffs' students, who are innocent of any wrongdoing whatsoever, by unfairly circumscribing their educational choices and opportunities. Such a step requires proof of intentional discrimination. *See Washington v. Davis,* 426 U.S. 229, 240 (1976) (proof of racially discriminatory intent or purpose is required to prove an equal protection violation); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 270 (1977) (racially "discriminatory purpose" must be "a motivating factor" of the official action being challenged before a court may act to remedy segregation). This is true even if the State's action seeks to prevent school segregation. *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406 (1977) (system wide remedy was not appropriate when institutional discrimination did not occur in all schools). In *Freeman v. Pitts,* __ U.S. __, 112 S. Ct. 1430, 1447 (1992), this Court, in a decision terminating busing in a Georgia school district, held:

> Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation.

It is immaterial that the State considers its purposes benign or beneficial to all concerned. In *Regents of the University of California v. Bakke* ("*Bakke*"), 438 U.S. 265 (1978), this Court held that the admissions policy of a medical school designed to assure a specified number or percentage of students from minority groups without proof of prior discrimination is unlawful discrimination in violation of the Fourteenth Amendment.

Although no single opinion controlled a majority of this Court, it was apparently held by a majority of this Court that consideration of race or ethnic origin in promoting an integrated student body would be constitutional only where such use ". . . is necessitated by the lingering effects of past discrimination," *Bakke, supra,* 438 U.S. at 326 n. 1 (Brennan, J., White, J., Marshall, J. and Blackmun, J., concurring in part and dissenting in part), and seeks ". . . to remedy disadvantages cast on minorities by past racial prejudice, at least where appropriate findings have been made. . . ." *Id.,* 438 U.S. at 325. Thus, Justice Powell's swing opinion held that to construct student bodies based on specified percentages of racial groups was "discrimination for its own sake," and "facially invalid." 438 U.S. at 307. Limitations on consideration of race were again addressed by the plurality opinion issued in *Wygant v. Jackson Board of Education,* 476 U.S. 267, 274 (1986) ("*Wygant*"), as follows:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. . . .

Upon this and other opinions, *Wygant* held unconstitutional a faculty layoff plan designed to preserve minority "role models" by exempting minorities from ordinary seniority rules.

More recently in *Croson,* this Court held that the City of Richmond, while having a legitimate interest in avoiding spending public money on contracts with construction firms that engaged in discriminatory practices, nevertheless could not require that a specified percentage of subcontracts be awarded to minority

business enterprises based merely on "societal discrimination" or even upon findings of discriminatory practices in the construction industry outside of Richmond:

> While the States and their subdivisions may take remedial action when they possess evidence that *their own* spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.

488 U.S. at 504 (majority opinion) (emphasis added). Finding that ". . . none of the evidence presented . . . points to any identified discrimination in the Richmond construction industry," the Court held that there was no "compelling interest" that Richmond could permissibly seek to advance by its discriminatory practice. *Id.* at 505.

These decisions confirm earlier federal court decisions holding that segregation in public schools may not be remedied by an *inter*district solution without proof of *intentional racial discrimination by each district and* significant *inter*district effect:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of

> interdistrict segregation. . . . [W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

Milliken I, 418 U.S. at 744-45. This judicial caution results from the history and importance of local school district autonomy:

> . . . [T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.

Id., 418 U.S. at 741-742.

Thus, the State's concern about the concentration of minorities at DMHS cannot justify enjoining Cliffs' students on the basis of race from attending any other public high school in the State as all other students are allowed to do, from seeking educational excellence wherever they can find and pay for it as all other students are allowed to, and compelling Cliffs to remain affiliated with DMHS without, at a minimum, proof that Cliffs violated DMHS's students' rights. Such proof does not exist.

The State ignored *Milliken I*, and other related decisions, as purportedly reflecting only a limitation of federal injunctive power. Petitioner submits, however, that the rationale of *Milliken I* derives directly from the Fourteenth Amendment, and should apply with even greater force to the States. States have discretion

to identify and correct rights *violations, not* to make conscious use of race to advance policies:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that *a fortiori,* the States and their political subdivisions are free to decide that such remedies are appropriate. *Section 1 of the Fourteenth Amendment is an explicit constraint on state power* and the States must undertake any remedial efforts in accordance with that provision. *To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions* . . . the Framers of the Fourteenth Amendment . . . desired to place *clear limits on the States' use of race as a criterion* for legislative action, and to have the federal courts enforce those limitations.

Croson, 488 U.S. at 490-491 (O'Connor, J. joined by Rehnquist, C.J., and White, J.) (emphasis added).[4] The foregoing constraint makes it important for *this Court* to address the issue of race-conscious school assignments to alter *de facto* racial balances, particularly because of the pernicious effects of allowing "pursuit of racial balance at any cost. . . ." *Estes v. Metropolitan Branch, Dallas NAACP,* 444 U.S. 437, 450-451 (1980) (Powell, J., dissenting).

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4. This Court had once suggested *in dicta* that "to prepare students to live in a pluralistic society," school authorities could direct that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Swann v. Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16 (1971). That statement was not intended to refer to interdistrict actions, *Milliken I,* and is not consistent with the later holdings of *Bakke, Wygant, Croson* and *Freeman.*

The existence of a black majority at DMHS is not a violation of federal constitutional rights and therefore does not permit "affirmative action." In *Milliken II* this Court stated:

> . . . the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more.

433 U.S. at 280 n. 14. The constitutionally required something "more" must be acts by Cliffs that were intentionally segregative. *Milliken I, supra,* 418 U.S. at 744-53. Minimally, a finding of intentionally segregative action requires a *showing* of Cliffs' "passive participation" in the "private prejudice" of others causing that segregation. *Croson, supra,* 488 U.S. at 492-93 (plurality). The existence of "private prejudice" cannot be "presumed", *id.* at 500-503 (majority); here it does not exist. Neither the State Board nor the New Jersey courts found active or passive racial discrimination by any unit of government, and certainly not by Cliffs. The ALJ, the only decisionmaker who heard the evidence, specifically rejected the allegation that Cliffs or the Cliffs community was moved by bigotry rather than valid educational concerns, 209a, and found that Cliffs sought termination of the sending-receiving relationship in "good faith" with "genuine educational" concern. 228a-229a. The State Board stated that THS's tuition plan was non-discriminatory and color blind. 132a. There was no meaningful evidence that Cliffs' parents' choices were based upon racial prejudice rather than upon the same assessment of the ineffectiveness of the DMHS program that was made by white and black Englewood parents, and the same assessment of THS's superiority that was made by Cliffs. By seeking to establish a lawful relationship with THS or allowing its students to attend THS on a tuition basis, Cliffs neither committed a constitutional violation nor participated in private prejudice.

Nor did Cliffs' actions or those of its students have substantial

*inter*district effect. The absolute number of Cliffs' students leaving DMHS was only a small part of DMHS's loss of enrollment. The bulk of the loss of white students at DMHS from 1982-1987 was attributable to the departure or non-enrollment of *Englewood* students clearly having nothing to do with any policies or actions of Cliffs or Cliffs' residents. 113a-119a; Pa925-929. Thus, there was no necessity to import Cliffs' students in order to better integrate the high school of a community which was already fully diverse and could attract ample white students from its own population if its Board would improve DMHS's quality. 235a.

This case will allow the Court to consider whether the Fourteenth Amendment was meant to permit States to deny choice in order to promote a social leveling principle. Petitioner asserts that the Fourteenth Amendment rejects the State's race-conscious actions and tolerates the racial balances that result from society's free, non-governmental choices:

> So long as there is free choice . . . there is no reason to require that the schools be made identical. The constitutional right is equal racial access to schools, not access to racially equal schools; whatever racial imbalances such a free-choice system might produce would be the product of private forces.

Freeman, supra, 112 S. Ct. at 1452 (1992) (Scalia, J., concurring).

II.

THE STATE BOARD'S RACE-BASED ACTION IS SUBJECT TO STRICT SCRUTINY UNDER THE FOURTEENTH AMENDMENT

The State Board's Decision and Order, which were affirmed unchanged by the Appellate Division and New Jersey Supreme

Court, being based upon race and nothing else, violate Cliffs' students' equal protection rights pursuant to the Fourteenth Amendment as such rights have been delineated in the decisions of this Court. "When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect." *Bakke*, 438 U.S. at 305 (Powell, J. joined by White, J.). The core purpose of the Fourteenth Amendment is to prevent states from discriminating on the basis of race. *Croson*, 488 U.S. at 490-91; *see also, Wygant*, 476 U.S. at 277 (the principal purpose of the Fourteenth Amendment is to do away with state discrimination based on race) (plurality opinion).

Last term, in *Shaw v. Reno*, __U.S.__, 113 S. Ct. 2816 (1993), this Court held that appellants could state a valid equal protection claim resulting from alleged racial gerrymandering for the purpose of creating black majority legislative districts. In so holding, this Court affirmed two important principles of its equal protection analysis that were, in effect, improperly rejected by the decision of the New Jersey Supreme Court. First, a law or policy does not have to state explicitly that it is making a classification based on race to constitute an improper racial classification, and be the subject of strict constitutional scrutiny. Even *facially neutral measures* designed to affect racial composition are *subject to strict scrutiny.* Thus, this Court quoted *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979):

> A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. . . . This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.

113 S.Ct. at 2825 (citations omitted). Here, there is no rational way

to understand the denial of severance or the injunction other than as a race-based classification. The Appellate Division's assertion that this is a mere geographic classification because it applies to all Cliffs' and Englewood's students is a thinly veiled pretext. The only reason severance was denied and the injunction was imposed on Cliffs was because at this time it has a predominantly white and Asian school-age population, which the State wishes to use to remedy its neighbor's failure to attract its own white and Asian population.[5]

Second, this Court made clear in *Shaw* that race-based classifications are constitutionally questionable regardless of whom they benefit and whom they affect negatively:

> . . . [E]qual protection analysis "is not dependent on the race of those burdened or benefited by a particular classification." . . . Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

Id. at 2829 (citations omitted). Thus, the State's attempt to utilize Cliffs' predominantly white and Asian student population to achieve certain goals for DMHS's racial composition facially violates the Fourteenth Amendment, and should have received a

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5. The fact that Englewood's students were also enjoined does not dilute the improper race-based character of the injunction leveled against the Cliffs' students. There are in reality two separate injunctions. The injunction which affects Englewood is an *intra*district remedy, which does not run afoul of the same proscriptions (*see, e.g., Milliken I*), as the unwarranted *inter*district attempt by the State to force Cliffs to cure Englewood's alleged problems. Equally as important is the obvious fact that the injunction affecting Englewood was imposed to induce its *white* population to return to DMHS and therefore was clearly race-based. It is also constitutionally suspect on that basis, but may be subject to greater latitude in review because of its *intra*district character.

strict and tireless scrutiny, instead of a cursory rubber stamp by the New Jersey state courts in violation of this Court's rulings.

III.

NO COMPELLING STATE INTEREST EXISTS, NOR ARE THE STATE'S ALLEGED REMEDIES NARROWLY TAILORED

This Court has held that the imposition of even allegedly permissible "remedial" racial measures may be sustained only if *necessary* to achieve a *compelling* governmental interest, *and "narrowly tailored"* to this purpose. *See Shaw, supra,* 113 S. Ct. at 2825; *Bakke, supra,* 438 U.S. at 305.

The Appellate Division and the State Board determined that such a compelling interest existed here in providing diversity in the public schools.[6] This interest is not "compelling" in the circumstances of this case. Even Englewood's experts agreed that withdrawal of Cliffs' students entirely would not impair DMHS's diversity. Mr. Richard Segall, DMHS's principal, testified that DMHS was "rich in diversity" in 1986-87. 5/11T91. He conceded that if only the Cliffs' students at DMHS were withdrawn, then absent a further secondary withdrawal (which the ALJ found was too speculative for consideration, 98a), DMHS would continue to provide peer models for all groups. 5/11T98-99. Dr. Michelle Fine, Englewood's social psychology expert, testified that she would consider a school to be segregated if its student body was over 90% black. 6/2T126. She stated that the anticipated drop in the white proportion of the DMHS student body from 14.6% to 12.4% would

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6. It also commented that there was an interest in insuring that public dollars do not promote a private prejudice. 73a. As already shown, the ALJ, who was in the best position to evaluate the issue, found no basis to conclude that the State would be financing private prejudice.

not have segregated DMHS. 6/2T126-127. Mrs. Barbara Marsan, Englewood's former Board president, testified that DMHS is a diverse school, and that it would continue to be diverse if the student body was only 10% white. 6/15T33-35. Dr. Alma McCloud Evans testified that greater racial diversity in schools was not recommended by the National Commission on Excellence in Education. 7/30T135-137. She further conceded that most experts do *not* list racial or socioeconomic diversity as being the measure of effectiveness of schools or central to excellence in education. 7/30T149. No expert claimed that the withdrawal of Cliffs' students would in itself affect diversity. 6/2T126-127, 5/13T59-60.

The numbers used by the Commissioner and ALJ show that, as of September 30, 1987, there were 94 white students, 142 Hispanic, 31 Asian, 3 "other," and 529 black students at DMHS (118a); only 21 students were from Cliffs, 15 of whom were white. 231a-232a. Withdrawal would not cause an absolute absence or *de minimus* presence of whites. 79 students (or one-tenth of the student body) in classes, halls and activities were interacting with the rest of the student body and, as conceded by all of Englewood's experts, DMHS was and would remain diverse without the Cliffs' students.

The assumption that, for example, a Native American must sit in each class in each school in order to teach respect and understanding for all races, religions and creeds is unfounded. This type of assumption perpetuates racial stereotypes. *Shaw,* 113 S. Ct. at 2828; *see also, id.* at 2845, n. 2 (Justice Souter, dissenting). In *Shaw* this Court concluded:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.

Id. at 2832. The State Board having acknowledged that there was no basis to determine what the appropriate mix of Asians, Hispanics, blacks or whites would be in any particular community to achieve its ends, 126a, it was outrageous for the Appellate Division, and thus the New Jersey Supreme Court, to proceed to rule that the *de minimus* change caused by the withdrawal of all 21 Cliffs' students (15 of whom were white) in the 1987-1988 school year implicated a *compelling* state interest. The State's analysis indeed represents the triumph of that which Chief Justice Rehnquist found "troublesome" in *Board of Ed., Los Angeles, supra,* 448 U.S. at 1348 — the attitude that, like textbooks, white students — because they are white — are something "that every good school should have."

Moreover, there were more than ample numbers of white students in Englewood's school age population to make up for any loss in the white student percentage at DMHS attributable to a withdrawal by Cliffs. With far fewer than half of the white students residing in Englewood attending Englewood public schools in 1987-1988, there was a substantial pool of potential enrollees to remedy any concerns over racial composition. Pa780, 925-929; 118a-119a. The ALJ found Englewood's students *would* return if educational standards improved. 235a; *see also,* 5/13T78-79. However, the State failed to consider the "pool of eligible [white] students . . . who have withdrawn . . . to private school [or] parochial school . . ." from Englewood (as opposed to Englewood Cliffs, *compare,* 164a) and to determine that Englewood has a sufficiently large and diverse community to maintain balance without resort to Cliffs' students. It was completely unnecessary to deny severance, and even more so, to utilize the strong-arm tactic of an injunction to cross district lines and undermine the rights of the innocent students of the Cliffs district.

Moreover, the State failed to explore or adopt less intrusive alternatives. Improving DMHS' quality would have increased

white enrollment from within Englewood. 235a. "Magnet schools" — schools offering special programs or excellence — could have been tried. 7/14T51-53, 7/21T(Part I) 67-68. *See, e.g., Jenkins by Agyei v. State of Missouri,* 855 F.2d 1295, 1301-1305 (8th Cir. 1988), *rev'd on other grounds,* 495 U.S. 33 (1990); *see also* 236a-237a (research verifies "the effectiveness of such noncoercive techniques."). By failing to limit itself to necessary and narrowly tailored remedies, the State's actions cannot withstand strict scrutiny. They thus violate the Fourteenth Amendment and should be overturned by this Court.

CONCLUSION

For the foregoing reasons, Petitioner urges this Court to grant the petition and allow the writ of certiorari.

Respectfully submitted,

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Dated: September 3, 1993

APPENDIX A — *PER CURIAM* OPINION OF THE SUPREME COURT OF NEW JERSEY, DATED JUNE 9, 1993

Supreme Court of New Jersey

A-121/122/123/124/125 September Term 1992

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner-Appellant
and Cross-Respondent,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent-Respondent and
Cross-Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Cross-Respondent-Appellant and
Cross-Respondent,

and

A.S., by her Guardian *ad litem* R.S.,

Intervenor.

Argued May 3, 1993 — Decided June 9, 1993

Appendix A

On appeal from and on certification to the Superior Court, Appellate Division, whose opinion is reported at 257 *N.J. Super.* 413 (1992).

Joel D. Siegal argued the cause for appellant and cross-respondent Board of Education of the Borough of Englewood Cliffs, Bergen County (*Hellring, Lindeman, Goldstein & Siegal,* attorneys; *Mr. Siegal, Bruce S. Etterman,* and *Matthew E. Moloshok,* of counsel).

James S. Rothschild, Jr., argued the cause for cross-respondent-appellant and cross-respondent Board of Education of the Borough of Tenafly, Bergen County (*Riker, Danzig, Scherer, Hyland & Perretti,* attorneys).

Arnold K. Mytelka argued the cause for respondent and cross-appellant Board of Education of the City of Englewood, Bergen County (*Clapp & Eisenberg* and *Paul L. Tractenberg,* attorneys; *Mr. Mytelka, Mr. Tractenberg,* and *Agnes I. Rymer,* on the briefs).

Mary C. Jacobson, Deputy Attorney General, argued the cause for respondent and cross-respondent State Board of Education (*Robert J. Del Tufo,* Attorney General of New Jersey, attorney; *Marlene Zuberman,* Deputy Attorney General, on the briefs).

Appendix A

Zulima V. Farber, Public Advocate, argued the cause for *amicus curiae Pro Se* (*Ms. Farber,* Public Advocate, attorney; *Stephen Eisdorfer,* Assistant Deputy Public Advocate, on the letter briefs).

Bernard K. Freamon submitted letter briefs on behalf of *amici curiae* The National Association for the Advancement of Colored People, The New Jersey State Conference of the N.A.A.C.P., and the Bergen County Branch of the N.A.A.C.P.

PER CURIAM

We affirm the judgment below, including the order requiring a regionalization study, substantially for the reasons set forth in Judge Long's comprehensive opinion reported at 257 *N.J. Super.* 413 (1992). We are satisfied that such a study is authorized under the broad powers vested in the State Board of Education. As the Appellate Division noted, "[I]t is hard for us to imagine any reasonable person challenging the power of the Board to 'study' an issue committed to its overall authority." *Id.* at 482.

In reaching that conclusion we find it unnecessary to consider whether the State Board of Education has the authority to require regionalization in this case or whether a court may require regionalization as a judicial remedy. We neither express nor imply any position or opinion on the regionalization issue itself, and specifically emphasize that our affirmance of the authority of the State Board of Education to undertake such a regionalization study must not be taken to express or imply any view of the Court on the administrative or judicial power to require inter-district regionalization.

Appendix A

Chief Justice Wilentz and Justices Clifford, Handler, O'Hern, and Stein and Judges Michels and King join in this opinion. Justices Pollock and Garibaldi did not participate.

APPENDIX B — DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DATED JUNE 15, 1992

Superior Court of New Jersey
Appellate Division

608 A.2d 914

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY, PETITIONER-CROSS-RESPONDENT/APPELLANT, v. BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, RESPONDENT-CROSS-PETITIONER/CROSS-APPELLANT, v. BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY, CROSS-RESPONDENT/RESPONDENT, AND AS, BY HER GUARDIAN AD LITEM, R.S., INTERVENOR/RESPONDENT.

Argued December 17, 1991 — Decided June 15, 1992.

Before Judges LONG, BAIME and THOMAS.

Joel D. Siegal argued the cause for appellant Board of Education of the Borough of Englewood Cliffs (*Hellring, Lindeman, Goldstein & Siegal*, attorneys, *Joel D. Siegal, Robert S. Raymar, Ronnie F. Liebowitz, Bruce S. Etterman* and *Matthew E. Moloshok*, on the brief).

Mary C. Jacobson, Deputy Attorney General, argued the cause for respondent State Board of Education (*Robert J. Del Tufo*, Attorney General, attorney, *Mary C. Jacobson*, and *Nancy Kaplan Miller*, Deputy Attorney General, of counsel, *Marlene Zuberman* and *Donald Parisi*, Deputy Attorneys General, on the brief).

Arnold K. Mytelka argued the cause for respondent-cross-

appellant Englewood Board of Education (*Clapp & Eisenberg*, attorneys, *Arnold K. Mytelka, Paul L. Tractenberg* and *Agnes I. Rymer*, on the brief).

James S. Rothschild argued the cause for respondent Board of Education of the Borough of Tenafly (*Riker, Danzig, Scherer, Hyland & Perretti*, attorneys, *James S. Rothschild*, of counsel and on the brief, *Vito A. Gagliardi, Jr.*, on the letter brief).

Stephen M. Eisdorfer, Assistant Deputy Public Advocate, argued the cause for *amicus curiae* The Public Advocate of New Jersey (*Wilfredo Caraballo*, Public Advocate, attorney, *Kevin H. Marino*, Counsel to the Public Advocate, and *Stephen M. Eisdorfer*, on the brief).

Bernard K. Freamon, attorney for *amici curiae* The National Association for the Advancement of Colored People, the New Jersey State Conference of the NAACP, and the Bergen County Branch of the NAACP (Samuel L. Walters, Assistant General Counsel, NAACP, of counsel and on the brief).

The opinion of the court was delivered by

LONG, J.A.D.

On this appeal from a decision of the State Board of Education, we are called upon to interpret the term "substantial negative impact" in *N.J.S.A.* 18A:38-13 (the statute which requires the approval of the Commissioner of Education before a sending-receiving relationship between two school districts may be severed); to revisit the so-called single community doctrine of *Jenkins v. Tp. of Morris School District and Bd. of Educ.*, 58 *N.J.* 483, 279 *A.*2d 619 (1971); to explore the power of the State Board to act generally in aid of its jurisdiction, and to assess the State

Appendix B

Board's decision to order a regionalization study including some unwilling districts.

We hold that *N.J.S.A.* 18A:38-13 is not a traditional balancing statute. In assessing an application for severance, the finding of a substantial negative impact on educational quality in one district warrants disapproval of severance, notwithstanding any number of "positive" impacts which severance would bring to the other district. We also hold that under *Jenkins,* the existence of a "single community" is not a prerequisite to the power of the State Board to bridge school district boundaries where necessary to vindicate the State's policy against segregation. In addition, we confirm the power of the State Board to issue such ancillary orders to school districts in this State as are required to ensure compliance with its policies. Finally, we affirm, as a viable alterative under the facts presented, the State Board's order that a regionalization study take place.

I

Procedurally, the case arose on December 23, 1985, when the Board of Education of Englewood Cliffs (Cliffs) filed a petition with the Commissioner of the New Jersey Department of Education (Commissioner) under *N.J.S.A.* 18A:38-13, seeking to sever the sending-receiving relationship with the Board of Education of Englewood (Englewood) pursuant to which Cliffs had been sending its high school students to Dwight Morrow High School (DMHS) in Englewood. Englewood opposed the petition and filed a cross-petition seeking to enjoin the Board of Education of Tenafly (Tenafly) from accepting high school students from Cliffs or Englewood. Englewood also asked that the Commissioner regionalize the three municipalities into one district at the high school level. Tenafly sought the dismissal of the cross-

petition as to it and Cliffs answered, opposing regionalization. The Commissioner transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -11. Between January 7, 1987 and October 6, 1987, Administrative Law Judge Kenneth Springer (ALJ) conducted 99 days of hearings.

On April 18, 1988 the ALJ issued an initial decision recommending the denial of Cliffs' petition for severance because of the negative impact which severance would have on the racial balance of DMHS; the denial of an alternative "dual" sending-receiving relationship among Englewood, Cliffs and Tenafly because it offered no real free choice to less affluent Englewood parents; and the denial of Englewood's cross-petition for regionalization or a comprehensive regionalization study because the potential risks of regionalization were greater than the potential rewards. He also recommended that Tenafly be restrained from accepting any students from Cliffs or Englewood not currently enrolled in a Tenafly school. All parties filed exceptions.

On July 11, 1988 the Commissioner issued a decision adopting the ALJ's findings and recommendations. However, he directed that eighth graders from Cliffs, enrolled in Tenafly as of April 18, 1988, be allowed to remain in Tenafly and attend Tenafly High School (THS) should they so desire. In refusing to order regionalization or a comprehensive regionalization study, the Commissioner opined that regionalization is only available where the districts to be regionalized constitute a single community; where the proofs establish that regionalization would be feasible, reasonable and workable; and where regionalization can be accomplished without any practical upheavals. He concluded that Englewood had failed to meet these criteria. Cliffs and Tenafly

appealed to the State Board of Education and Englewood cross-appealed.[1]

Subsequently, the Legal Committee of the State Board issued a report essentially adopting the findings and conclusions of the Commissioner, with two important modifications: first because there was insufficient evidence of the need for regionalization, the Committee recommended that the Commissioner monitor the racial composition of DMHS and report to the State Board periodically with his findings. Second, the Committee recommended the injunction against accepting Cliffs and Englewood students be extended to all public school boards in the State. Cliffs and Englewood filed exceptions.

On April 4, 1990 the State Board issued a decision which essentially affirmed the findings and conclusions of the Commissioner with some modifications, including those recommended by the Legal Committee. It also directed Cliffs and Englewood to develop a plan, in consultation with the Commissioner and subject to his approval, to encourage their students to attend DMHS. It ordered the Commissioner to monitor the plan and the racial composition of DMHS for five years and to report to it annually as to the effect of the plan on the racial composition of DMHS. The State Board exempted from its decision all students from Cliffs and Englewood attending THS or other public high schools as of the date of the initial decision (April 18, 1988).

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1. On November 1, 1988 the State Board granted the motion of "A.S.," a Cliffs' seventh grader attending school in Tenafly, to intervene in the proceedings on the question of whether the Commissioner's eighth-grade cut-off was arbitrary. (The State Board ultimately held that the eighth-grade cut-off was not arbitrary, which holding is of no moment here because the intervenor is not participating in the appeal.)

Appendix B

Cliffs appealed, challenging the State Board's denial of its petition for severance, the denial of a dual sending-receiving relationship and the injunction. Englewood filed a notice of cross-appeal from the State Board's failure to order regionalization. We granted the motions of the National Association for the Advancement of Colored People (NAACP) and the Public Advocate for *amicus* status. Englewood filed an application for direct certification to the New Jersey Supreme Court which was denied.

During the pendency of this appeal, Cliffs and Englewood submitted their plans to encourage enrollment at DMHS to the Commissioner. On June 5, 1991 the Commissioner published his first annual report which suggested certain changes in those plans and recommended that the State Board order a regionalization study because of his doubts as to the effectiveness of remedial measures short of regionalization. On July 3, 1991 the State Board resolved to adopt the Commissioner's recommendations.

On August 5, 1991 Cliffs and Tenafly filed motions for leave to appeal from the State Board's resolution authorizing a regionalization study, claiming that the State Board's resolution violated *R.* 2:9-1 because of the pendency of the earlier appeal. We granted leave and stayed the resolution pending this review. The appeals were consolidated on September 10, 1991.

II

The record in this case is voluminous. Because the Commissioner and the State Board each essentially adopted the fact-finding of the ALJ, his decision will be set forth at length. We will also detail the recommendations of the ALJ and the decision of the Commissioner, even where they differ from the final decision

of the State Board, because that counterpoint serves to clarify the State Board's rulings.

A. *The Districts*

The Borough of Englewood Cliffs is an affluent suburban community of approximately two square miles. According to the 1980 census, it had a population of 5,698, which was 85.0% white, 9.3% Asian, 3.9% Hispanic, and 0.8% black. Cliffs operates two K-8 schools for its students. Because it has no high school facilities, since 1965 Cliffs has had a sending-receiving relationship with Englewood.

Englewood is a more urban community than Cliffs. Approximately five miles square, it had 23,701 residents according to the 1980 census. Of those residents, 44.6% were white, 40.6% were black, 8.8% were Hispanic and 2.8% were Asian. Englewood operates two elementary schools, one middle school and DMHS.

Tenafly, like Cliffs, is a suburban community. It is approximately four-and-one-half miles square and, according to the 1980 census, had a population of 13,552. Of these, 91.3% were white, 4.5% Asian, 3.0% Hispanic and 0.6% black. Tenafly operates four elementary schools, a middle school and THS.

All three districts are considered "affluent" relative to other communities in the county and state. As among themselves, households in Cliffs and Tenafly have much higher incomes than those in Englewood. While Englewood is a heterogeneous community, Cliffs and Tenafly are primarily white with growing Asian populations. All three districts are contiguous.

Appendix B

In addition to sharing common borders, the other significant community ties among the three districts include: some common cultural and recreational facilities (*e.g.*, attendance by Englewood and Cliffs' residents at summer and adult school programs in Tenafly); a common public library for Englewood and Cliffs; common medical facilities; shared road and public transportation links; and common religious services.

B. *The Schools*

Both DMHS and THS are four-year secondary schools, *i.e.*, grades 9-12. Beginning in the 1988-1989 school year, Englewood had planned to expand DMHS to include eighth grade students; Cliffs intended to continue sending its eighth graders to its own school.

1. DMHS

The school plant consists of two buildings (built in 1931 and 1967) on a well-landscaped, 34-acre campus shared with Englewood's middle school. The older building features an "exceptionally attractive" Gothic facade; the newer building is more austere. In 1985, a state facility planning team inspected DMHS and reported more than 20 deficiencies, ranging from chained and locked exit doors to "crumbly plaster" in classrooms. Nevertheless, officials did not cite DMHS for any violations, and the ALJ concluded that DMHS "must be deemed in substantial compliance with all applicable building standards." In 1981, Englewood completed a $1.45 million renovation of DMHS and approved a long-term improvement program for the period 1987-1991 at a cost of $2.08 million.

DMHS is a member of the Middle States Association of

Appendix B

Secondary Schools and Colleges (Middle States), a voluntary organization which uses an elaborate procedure for accrediting member schools. In 1976, Middle States approved DMHS but offered a list of recommendations for improvements. Although the deadline for re-evaluation was originally to expire in 1986, Middle States granted DMHS three successive one-year postponements and, as a result, re-evaluation was not completed by the time of the hearing; nevertheless, DMHS has never lost its accreditation.

The DMHS teaching staff has appropriate certification and adequate training and experience. In 1986-1987, the 94 teaching staff members were 61.0% white, 32.0% black and 6.0% Hispanic or Asian. A survey showed that teacher morale at DMHS was low in several areas: teachers wanted more input into the decision-making process and improvement of the physical working environment. During the 1980s, administrative instability was a problem at DMHS; three principals were hired between 1980 and 1986. Nevertheless, the qualifications and competence of Richard Segall, the DMHS principal who succeeded to the position in 1986, is unchallenged. With Segall, Englewood mounted a campaign to deal with the problems at DMHS.

At the time of the hearing, the DMHS library totaled approximately 16,000 volumes; however, many of the titles were outdated. The school attempted to increase the effectiveness of its library by extending hours of operation and by increasing (by 300.0%) the amount it spent on printed materials.

DMHS provides a wide range of courses for students of different ability levels and interests, including advanced placement, honors, and enrichment courses. Class size tends to be fewer than 20 students. In 1987, 64.0% of DMHS graduating seniors entered four-year colleges, and of those, almost 50.0% attended colleges rated "very competitive" or above by *Barron's*

Appendix B

Profiles of American Colleges (15th ed. 1986). Between 1986 and 1987 seven DMHS graduates attended Yale University, and a Yale official testified that the university valued the racial and cultural diversity at DMHS so highly that Yale representatives visited DMHS annually. Many of Cliff's students were enrolled in advanced placement classes at DMHS and excelled academically; in 1986, 22 out of the 23 Cliff's students who graduated from DMHS went on to college. In addition to college preparatory programs, DMHS offers a substantial industrial arts program, a broad continuum of special education services and a wide range of guidance services.

The SAT scores at DMHS are in keeping with New Jersey averages. However, the DMHS scores on the High School Proficiency Test in 1985, the first year the test was required for freshmen, were substandard. In 1986-1987, however, the scores improved substantially, placing DMHS above the State average in writing and math but slightly below average in reading. In general, those DMHS students who were not college-bound fared worse on standardized tests than average Bergen County high schoolers. Conservative estimates placed the DMHS dropout rate for grades 9-12 at 7.8% in 1986, which was high when compared to the county average of 2.0%-3.0%.

DMHS offers a wide variety of co-curricular activities including athletic teams, honor societies, debating and public affairs clubs, dramatic and musical productions, and school publications. Cliff's students actively participate in these programs; their degree of participation exceeds that of their Cliffs' peers at THS.

Historically, DMHS has placed special emphasis on proper student behavior and, under Segall's leadership, instituted new policies to reduce the number of students who cut classes and

engaged in other wrongful behavior. Attendance has been a major concern. Although DMHS saw a rise in attendance from 88.5% in 1985 to 90.8% in 1986-1987, its ultimate goal is 95.0%. Disciplinary out-of-school suspensions and the number of police and fire department calls dropped substantially between 1981 and 1987. No substance abuse incidents were reported in 1985 or 1986. On balance, the ALJ concluded that there was no foundation for rumors that students' safety and well-being were compromised at DMHS. In general, expert and lay witnesses alike described DMHS as a very good school.

2. THS

Completed in 1972, THS is a modern, well-maintained facility on a 28-acre tract abutting a stream. The interior is pleasant and cheerful, and the school features a library/media center with 28,000 books, well-equipped science and computer laboratories, student-teacher conference rooms, and a television studio. Like DMHS, THS offers a wide array of co-curricular activities.

At the time of the hearing, THS teachers had a slight edge over DMHS teachers in terms of experience and advanced degrees. The THS faculty was, however, characterized by a lack of ethnic diversity (in 1986-1987, 85 of its 87 teachers were white), reflecting the THS student and Tenafly Borough populations generally. Like DMHS, THS has experienced problems with administrative turn-over and teacher morale. Teachers have complained that they lack input as to decisions affecting them and do not receive proper recognition for their efforts.

Because the overwhelming majority of THS students are college bound (83.0% of THS graduating seniors entered four-year colleges in 1987), THS emphasizes college preparation. It offers limited industrial arts classes, and sends its vocationally motivated

students to the Bergen County Technical Education Center on a half-day basis. It does not have a full spectrum of special education programs and offers a conventional guidance program emphasizing college admissions.

Attendance at THS was 95.9% during the 1984-1985 school year. THS uses an innovative approach to discipline, giving qualified students freedom to move about the school facilities during unscheduled periods. In 1984-1985, THS reported three incidents of drug use, although it later admitted having concealed a number of other such incidents that year. The ALJ opined that the disparity between the number of drug incidents at THS and those reported at DMHS might have been due to greater monitoring at THS.[2]

C. *The Relationship between the Districts*

In October 1965, Cliffs and Englewood executed a 10-year sending-receiving contract to begin in 1967. The agreement essentially obligated Cliffs to send its public high school students to DMHS and required that Englewood maintain DMHS' accreditation and confer with Cliffs "on matters of mutual concern to the High School program." Cliffs was obligated to pay Englewood for the cost of educating its students.

Every year between 1970 and 1976 Cliffs sent approximately 60.0% of its graduating eighth graders, or approximately 60 to 70 students, to DMHS. The remaining Cliffs' eighth graders chose to attend private schools. During these years, the total number of

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2. Significantly more evidence was introduced and is recapitulated as to DMHS because it is the quality of that school which Cliffs made the primary issue in the case.

Appendix B

Cliffs' students attending DMHS averaged approximately 245 per year. During the middle 1970s, however, Cliffs became dissatisfied with the sending-receiving relationship. In 1977, rather than renew the relationship and because applicable law made terminations of such relationships subject to the Commissioner's approval, Cliffs petitioned the Commissioner to sever the relationship so that it could explore the establishment of sending-receiving relationships with other districts. Englewood opposed the severance. Cliffs eventually withdrew its petition, apparently because it was unable to support its allegation that DMHS was not providing a good education.

In 1978, Cliffs commissioned Francis A.J. Ianni and others, to study, "the community's attitudes towards their educational programs" ostensibly because of the decline in the number of Cliffs' students who were attending public school generally. In 1979, the Ianni study concluded that the Cliffs' community was dissatisfied with the class sizes and atmosphere in the lower grades, and the academic preparation in the middle grades. The study also showed that, at the high school (DMHS) level, Cliffs' parents were mostly concerned with racial balance, discipline and educational standards.

In the late 1970s, newspaper articles emphasizing the negative aspects of DMHS began to appear. These newspaper accounts contributed to the growing public perception that DMHS had serious problems and to the declining enrollment of Cliffs' students at DMHS. During this period, the question of severance became a political issue; at one point all of the candidates for Cliffs' school board were in favor of severance, and the slate most committed to severance ultimately prevailed in the 1985 election.

Between 1974 and 1982, Cliffs affirmatively encouraged its high school-aged students to attend DMHS. For example, during

Appendix B

1980-1981 "cottage parties" were held between Cliffs and Englewood, at which board members and teachers from DMHS were available to answer questions about the school; however, the program ceased after one year, and by 1982 Cliffs stopped encouraging its students to attend DMHS al.ogether.

Before 1982, THS was the receiving school for students from Alpine, a wealthy community on Tenafly's northeastern border. Around 1982, Tenafly's superintendent reported to Tenafly that, in an informal discussion with Dr. Harold France, Superintendent of Cliffs' schools from 1973 to 1986, Dr. France had said that it would be "most interesting" if and when Tenafly decided to admit non-resident students on a tuition basis, *i.e.*, admission based on individual tuition agreements with parents outside the district as opposed to a sending-receiving agreement with another district. In 1982-1983, Tenafly instituted a program to admit non-resident students to its public schools, including THS, on a tuition basis. When the program was adopted by Tenafly, Cliffs began providing, upon request, written instructions to the parents of Cliffs' students as to how to apply to THS for admission on a tuition basis, although it did not provide such instructions for any other school.

By 1983-1984 Cliffs had amassed grievances against DMHS as follows: declining attendance of Cliffs' students at DMHS; the belief that DMHS was no longer an effective school; Englewood's plan to begin sending its eighth graders to DMHS, thereby further alienating Cliffs' DMHS students (because they would be at DMHS one year less than Englewood's students); and Englewood's failure to have discussed with Cliffs, in advance, the policy of sending eighth graders to DMHS. In November 1985, Cliffs voted to enter into a sending-receiving relationship with Tenafly; Tenafly reciprocated. Until such time as Cliffs' sending-receiving relationship with Englewood was terminated, however, the THS policy was to accept Cliffs' and other municipalities'

students on a tuition basis. The primary factors which THS considered under its private admission program were the academic, disciplinary and attendance records of the applicants. Tuition for 1987-1988 was approximately $5,480.

From the inception of the THS private tuition program through 1986, 59.3% of its private students came from Cliffs and 22.9% from Englewood. In 1986, 76 students came from Cliffs and 16 from Englewood.

D. *Racial Composition and Enrollment Trends at DMHS and THS*

In general, public school enrollment was down in all three districts and this trend seemed likely to continue. Since 1977, enrollment of Cliffs' students at DMHS dropped dramatically and at a much faster rate than the general decline in the school-aged population. Having averaged approximately 60.0% throughout most of the 1970s, the number of graduating Cliffs' eight graders attending DMHS fell from a high of 69.0% in 1980-1981 to a low of 4.4% in 1987-1988, or 2.6% of the total DMHS enrollment. In 1982-1983, 1,128 students attended DMHS, of whom only 119 were from Cliffs. In that year the DMHS student body was 31.5% white, 55.5% black, 10.3% Hispanic and 2.7% Asian. In 1987-1988, 799 students made up the DMHS student body, of whom only 21 were from Cliffs. During that year, the racial composition of the DMHS student body had changed to 11.8% white, 66.2% black, 17.8% Hispanic and 3.9% Asian.

After Tenafly's non-resident private admission program began in 1982, the number of Cliffs' students attending THS rose annually while the number of Cliffs' students attending DMHS continued to drop. Table 1 sets forth the enrollment trend between 1982 and 1988:

Appendix B

TABLE 1

School Terms	Cliffs Students Attending DMHS	Cliffs Students Attending THS
1982-1983	119	11
1983-1984	92	21
1984-1985	73	33
1985-1986	60	48
1986-1987	35	62
1987-1988	21	76

In addition, following the inception of Tenafly's tuition program, the number of non-resident tuition students from all districts attending THS increased. By 1985-1986, THS had 74 non-resident students, or roughly three times the number of non-resident students enrolled in any other high school district in the State. For example, of the 43 high school districts accepting non-resident students, only 16 had more than five such students.

In 1987-1988, Cliffs' 486 students were 50.8% white, 42.2% Asian, 5.5% Hispanic and 1.5% black. Of the 21 Cliffs' students attending DMHS in 1987-1988, 15 were white, 4 were Asian and 2 were Hispanic. Had Cliffs sent those students to THS instead, it would have altered the composition of DMHS to 10.2% white, 68.0% black, 18.0% Hispanic and 3.5% Asian. Such an alteration would have been a 16.0% loss in the DMHS white student body but would have resulted in only a 1.6% decrease in the proportion of white students at DMHS. Had the sending-receiving relationship been terminated in 1982-1983, 119 students would have been withdrawn from DMHS, rather than the 21 under the 1987-1988 figures. According to the 1980 census figures for school-aged children of Cliffs, in 1982-1983 this would have resulted in an

approximately 6.5% decrease in the DMHS white student body.[3]

In 1985-1986, the THS student body of 946 was 84.0% white, 13.4% Asian, 1.3% Hispanic, and 0.6% black. Of the 48 Cliffs' students attending THS in 1986, 38 were white, 8 were Asian and 2 were Hispanic; none was black. In 1987-1988 the THS student body which declined to 891 was 80.7% white, 17.8% Asian, 0.9% Hispanic and 0.6% black.

Englewood's own students had, increasingly over the years, chosen to go to private schools rather than attend Englewood's public schools. Private school alternatives were readily available in the area, including more than 20 non-public secondary schools. According to Dr. France, the student migration away from public schools begins early (*i.e.*, sixth or seventh grade) as parents desire to reserve a place for their children in the upper grades of selective private schools.

E. *Causes and Effects of the Migration from DMHS*

From the time Cliffs made known its intention to form a sending-receiving relationship with THS and terminate its sending-receiving relationship with Englewood, Englewood argued that the issue was not school quality but race. Englewood's experts, Drs. Michelle Fine and Jerry Jacobs, explained that many white parents perceive integrated schools as inferior, and that this perception is a motivating factor in white parents' decisions as to where to send their children to school. Tenafly's expert, Dr. Eugene Smoley, Jr., acknowledged that both the quality and the perceived quality of a school are what substantially motivate parents' selection. Englewood's experts stressed the educational importance of racial diversity in public schools.

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3. The record did not include a specific racial breakdown of Cliffs' students at DMHS during 1982-1983.

Appendix B

A white Cliffs' resident, a 1986 graduate of DMHS, described her high school experience and related that as an eighth grader in Cliffs' upper school in 1982, she regularly heard her classmates using terms like "Dwight Nigger" and "Black Morrow" to refer to DMHS students. She also described the prevailing Cliffs' misconceptions about DMHS, including fears that female students would be attacked or raped, that students' property would be stolen, and that students would be exposed to rampant drug abuse and unsafe restrooms. On the contrary, she, along with many Cliffs and Englewood parents and students, believed that DMHS was a good, safe school which received wide support for its functions and sports activities from members of both communities.

While Englewood acknowledged that it should have consulted Cliffs with respect to its decision to move its eighth graders to DMHS, it maintained that, throughout the course of its sending-receiving relationship with Cliffs, there was open communication between the two boards and that their relationship was a good one. For example, Englewood involved Cliffs in the search for a new DMHS principal, which ultimately resulted in the selection of Segall. Although he cited several examples of disagreements between the two boards over the years, Dr. France acknowledged that the relationship between the two boards had been professional, and that generally Englewood had kept Cliffs informed of relevant matters and had responded to Cliffs' concerns.

Much of the evidence indicated that if Cliffs' parents were prevented from sending their children to THS, they would not send them to DMHS. This was largely due to the common perception in Cliffs as to problems at DMHS and the resulting "social pressure" on Cliffs' students not to attend DMHS. On the other hand, there was some evidence that certain Cliffs' parents would still enroll

their children at DMHS and keep them enrolled there if tuition relationships with THS were enjoined (*e.g.*, in 1988, 3 of 14 Cliffs' eighth graders planning to attend THS said they would attend DMHS if not allowed to go to THS. Out of 25 Cliffs' students who started DMHS in 1982, 23 graduated in 1986).

Cliffs' expert, Dr. Mario Tomei, using the cohort survival projection method (*i.e.*, a methodology based upon the proportion of students attending one grade who were enrolled in the same school in the previous grade), projected that if the Cliffs-Englewood sending-receiving relationship was not severed and DMHS remained a 9-12 grade school, by 1990-1991 there would be 58 white students at DMHS, or 8.8% of the student body; and if the relationship were severed, he predicted that there would be 43 white students at DMHS, or 6.7% of the student body. In an 8-12 grade school, Tomei projected a total of 61 whites without severance, or 7.6% of the student body; with severance, he projected a total of 46 whites or 5.8% of the student body. Unlike Englewood's experts, Tomei projected no secondary loss of middle class Englewood black and Hispanic students as a result of severance.

Dr. Jacobs opined that, in the event of severance, DMHS would be 3.0% white, 1.0% Asian, 77.0% black and 18.0% Hispanic. Along with Dr. Jacobs, Dr. Fine also argued that there would be a secondary impact—*i.e.*, the loss of Englewood white, Asian and middle class black and Hispanic students from DMHS. According to these experts, a decrease in the racial diversity of DMHS and migration of its white students would be widely seen as an acknowledgment that DMHS is an inferior school essentially for the poor and unmotivated student and would also result in a so-called "symbolic loss," which would stigmatize those students still attending DMHS after a severance.

Appendix B

F. *Regionalization*

Instead of prescribing a definitive regionalization configuration, Englewood proposed several different scenarios, all of which took into account the fact that neither DMHS nor THS is large enough to accommodate the combined districts' student body (1,690). The first scenario centered around the existing structures. One facility could be used for grades 9 and 10 and the other for grades 11 and 12. A second possibility was to create two magnet schools (one for arts and humanities and one for science and math). A third variation was to use each facility as a comprehensive 9-to-12th grade high school but not to assign students to the schools based on residence. Another alternative was to enlarge the THS facility to accommodate all the students. The final possibility was to combine or regionalize the three districts and construct a new high school for the region. The configuration chosen would be dependent upon the region's goals and the resources available.

According to Dr. Jacobs, regionalization of the three districts (taking into consideration the Alpine students currently attending THS) would create a 9-to-12 high school region which would be 48.0% white, 31.0% black, 13.0% Asian and 8.0% Hispanic. Those percentages would be substantially stable for the five-year period 1986 to 1991.

Along with Jacobs, Englewood's expert, Dr. Daniel Knueppel opined that regionalization would not cause substantial "white flight." According to them, regionalization would have many attributes, including: providing affirmative action for the existing THS staff as it merges with the DMHS staff; creating comprehensive social learning for THS students as they interact with the racially and economically diverse student body and faculty at DMHS; solving the problems which both schools have

had with declining enrollments; creating one school region with an optimal (*i.e.*, approximately 1500) enrollment; and combining the strengths of the two programs by providing a broader and richer educational experience. All experts substantially agreed that regionalization of the three districts was theoretically feasible, based upon the geographic proximity of the districts, the historical attendance of students across district lines, the general compatibility of DMHS and THS, and the conceivable financial resources available.

There was also testimony as to the negative side of regionalization, including: the cost of building a new school or, in the alternative, the increased costs of running both schools simultaneously as one region; the increased cost and amount of busing; the potential loss of community support and involvement in the schools; a perceived loss of local control over the schools; the potential damage to the proven success of Tenafly's high level of K-12 curriculum articulation; the potential lack of racial diversity and harmony even after regionalization; diminution of staff morale and participation in decisions; diminution of student participation in co-curricular activities, and reduction in the individualized approach to education. Thus, although it was feasible, Cliffs and Tenafly maintained that regionalization was not practical, reasonable or desirable.

G. *The ALJ's Findings and Recommendations*

From these facts, the ALJ arrived at the following findings on Cliffs' motivation for seeking severance:

> Among the reasons why the Cliffs Board might legitimately prefer THS are: (1) A more suitable academic program for most college-

> bound Cliffs students; (2) Less need for emphasis on discipline and more opportunity for student independence and self-reliance; (3) Nicer and newer school facilities; (4) A better stocked library; (5) Past administrative instability at DMHS; (6) Past failure by the Englewood Board to correct deficiencies over a period of years and (7) Inadequate consultation by the Englewood Board about an important matter affecting the Cliffs students.

He concluded:

> Accordingly, the Cliffs' Board's request for relief is made in good faith, for what it conceives to be the best educational interests of its students.

However, as to the quality of education at DMHS, the ALJ opined:

> Cliffs students at DMHS can get a good solid education which more than adequately prepares them for college and for later life. In addition, DMHS has a broader and more comprehensive curriculum, superior in certain respects to the more narrow focus of THS's curriculum, particularly for students interested in vocational careers or requiring special education services. Recently, the Englewood Board has made headway in correcting many of its past problems.

With respect to the impact of severance on racial balance, he found that:

Appendix B

> [B]ecause DMHS is so precariously short of white and Asian students, loss of even a small number of Cliffs students would have a significant impact on racial balance. Seen as a drop in the overall proportion of white students at DMHS, the loss of 15 white Cliffs students would make a difference of 1.6%, seemingly a negligible amount. However, these 15 white students constitute 16.0% of the total of 94 white students presently at DMHS.
>
> The best estimate of enrollment in the foreseeable future came from Dr. Tomei, who used three years of recent data which most accurately reflect current enrollment trends. Projections to the year 1990-91 indicate the loss of 15 white Cliffs students in that year would make a difference of only about 2.0% in the proportion of whites attending DMHS. Again, however, these 15 white students would constitute approximately 25.0% of the total number of white students projected for either a 9-12 or an 8-12 high school. Even if one accepts Dr. Tomei's figures, the impact on racial composition must be regarded as substantial in a school with such a low white and Asian population.

As to secondary loss, the ALJ found:

> Use by Dr. Jacobs of seven years of data in projecting enrollments is not improper, but presents an unduly optimistic picture of what

> may reasonably be expected in light of most recent experience. Furthermore, Dr. Jacobs' dire prediction of wholesale abandonment by Englewood white and middle class families of their own good school system is sheer speculation, unsubstantiated by adequate facts and based on false analogy. Undoubtedly some amount of "secondary" loss would occur if severance were granted, but Dr. Jacobs has not provided a credible basis for quantifying that amount.
>
> More fundamentally, the "secondary" loss argument proves too much. It places an impossible burden in the path of any sending district dissatisfied with the quality of education its children are receiving. Carried to its logical absurdity, the Commissioner of Education would never be able to grant severance from the worst receiving districts, for fear of creating a panic among the local inhabitants. While a sending district may rightfully be held responsible for any negative impact caused by the withdrawal of its students, it should not be blamed if the receiving district's population does not support its own school system.

With respect to educational quality, the ALJ stated:

> I find that severance would have a substantial negative impact on the quality of education at DMHS, much greater than any

material loss caused by the withdrawal of 21 Cliffs students. In effect, any material losses would be greatly magnified by symbolic losses.

Departure of 21 students, in and of itself, would not seriously impair the educational program at DMHS. Reasonable minds may differ as to what size is "ideal" for a high school, but even a small school of under 800 students is capable of sustaining a quality educational program. Since the Englewood Board possesses the prerogative of reallocating resources to preserve particular courses or to implement other educational priorities, it is speculative to hazard any guess as to which specific courses might be affected by the withdrawal of 21 Cliffs students.

However, Dr. Fine's excellent study substantiates that "any material losses pale by comparison with the symbolic losses" which DMHS would suffer if severance were approved. As that comment implies, the sticking point here is not so much the actual loss of a few students, but what that loss would signify. Those left behind at DMHS would perceive the result as an implicit message that the school is not good enough for whites and Asians, but is acceptable for blacks and Hispanics. Feelings of isolation and inferiority engendered by such perceptions would lower the self-confidence of minority youngsters and

be detrimental to their trust in the basic fairness of the educational system. Speaking as a trained psychological observer, Dr. Fine stated that the reaction of black students to this litigation goes beyond mere "disappointment." Black students to whom she spoke uniformly viewed the situation as "betrayal" by the one public institution to which they belonged. Reemergence of the stigma of inferiority associated with segregated school systems would be a regressive development for public education in New Jersey and would have serious repercussions far beyond the immediate parties to this case. Policymakers at the state level must give careful consideration to the negative implications severance would have for future race relations and social cohesiveness, not only at DMHS but also in other schools throughout this state.

To make matters worse, the Cliffs students are not evenly distributed among all socioeconomic groups and ability levels at DMHS. Rather, as Mr. Segall confirmed, the Cliffs contingent represents a disproportionately large number of upper income and high-achieving students who help to motivate and set an example for economically deprived and lower-achieving students. Loss of these particular students, therefore, would have a much greater negative impact on educational quality than their number alone would suggest.

Appendix B

> Any charge that the Tenafly Board is not meeting its regulatory responsibility to encourage social learning must be rejected. Proofs establish that THS, with its large Asian and Jewish student population, has a diverse enrollment in the areas of culture, religion and native language. Sufficient opportunity exists within the Tenafly public schools for students to associate and mingle with persons of ethnic and religious backgrounds different from their own, although exposure to blacks and Hispanics or to persons of different socioeconomic status is severely limited. Commendably, the Tenafly school administration does not leave social learning to chance alone, but plays an active role in teaching social learning skills as an integral part of the required curriculum and an essential function of its co-curricular activities. Yet the finding is inescapable that DMHS has a much richer mix of racial and socioeconomic types which contribute to a more stimulating environment and a greater potential for exchange of ideas. Cliffs students who abandon DMHS would be losing a very enriching environment which they would be unable to duplicate at the more racially and socioeconomically homogenous THS.

The ALJ found that severance would not have a substantial impact on Englewood's financial condition or on facilities utilization.

On the subject of Tenafly's tuition policy, the ALJ found:

Appendix B

[The] Tenafly Board has a novel tuition policy enacted to alleviate the adverse effects of its own declining enrollment. As applied to THS, the policy has many characteristics of a private school placement, including selective entry requirements, higher academic standards and payment of tuition. On its face the policy may not be racially exclusive, but whites and Asians, as a group, are better able to afford the entry fee. In practice, the policy has attracted a disproportionately high number of students residing in the neighboring communities of Cliffs and Englewood. Its practical effect is to drain upper income white and Asian college-bound students from DMHS, subverting that school's efforts to promote racial balance and luring many of its most academically talented students. Existence of the Tenafly tuition policy also creates social pressures among Cliffs students not to attend DMHS, even though it is the assigned public high school for Cliffs residents.

Factually it is immaterial to a determination of this case how many tuition students from Cliffs might decide to go to private or parochial schools after the Tenafly option is foreclosed. THS is not a private institution, regardless of how it has been conducting its affairs. While state education officials do not have the authority to prevent someone from attending a nonpublic school, they do have unchallenged constitutional and

> statutory responsibility for supervising the public education system. A pernicious practice in the public schools cannot be allowed to continue unchecked simply because otherwise some parents might decide to remove their children from the public school system. Fact-finding should deliberately avoid any inquiry into what choices parents might conceivably exercise if the state's strong policy against segregation in public schools is properly enforced. Otherwise, the process may be misinterpreted as tacit encouragement of flight from the public schools in order to circumvent the law. Thus, it is unhelpful—as well as unseemly—to engage in a numbers game regarding how many of the Cliffs or Englewood students now or prospectively at THS would otherwise go to DMSHS. The key facts are that THS enrolls 76 Cliffs students and 16 Englewood students who, by all rights, belong at DMSHS if they choose to attend public school. Tenafly's tuition policy seriously undermines the continuing ability of the Englewood district to provide equal educational opportunity to all its students.

He concluded:

> Tenafly has been fishing in troubled waters. Bluntly stated, the Tenafly Board has adopted a tuition policy which has the clear effect of enticing white and Asian students away from a nearby public high school already

experiencing racial imbalance, thereby contributing to a polarized situation. To accomplish its own ends, the Tenafly Board has instituted selective admissions requirements, including what is tantamount to an income test since only those who can afford to pay are eligible for admission. In what could accurately be called "cream-skimming," the Tenafly tuition policy achieves its intended purpose by attracting more highly motivated and academically competent students from its neighboring school district, at the expense of educational quality at DMHS.

In order to condemn Tenafly's beggar-thy-neighbor policy it is unnecessary to establish that its adoption was the efficient producing cause of the decline in the number of Cliffs students at DMHS. (On the contrary, the evidence here tends to show that the beginning of the decline predated Tenafly's adoption of its tuition policy, although the decline has since accelerated.) It is enough that the Tenafly Board has set in motion a policy which exploits another district's weaknesses for its own benefit, thereby aggravating a bad situation. By the same token, it is unnecessary to find that the Tenafly Board was motivated by improper racial considerations in order to put a halt to the mischief it has made. Good intentions on the part of a wrongdoer "do not serve to negate the State's involvement in violation of a constitutional duty." *Norwood v. Harrison*,

Appendix B

> [413 *U.S.* 455, 466, 93 *S. Ct.* 2804, 2811, 37 *L. Ed.* 2d 723, 732 (1973)]. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Ibid.* Tenafly is hardly in the position of an innocent bystander.

He went on to characterize the Tenafly tuition policy as "repugnant" and "against the law", and opined:

> If the Commissioner were to give his blessings to establishment of a new sending-receiving relationship between the Cliffs and Tenafly Boards, it would lend legitimacy to an illegitimate arrangement. In essence, it would put the official state imprimatur on what the Tenafly Board has done. (citation omitted).

The ALJ found that the three municipalities are autonomous and distinct and that:

> [T]he disadvantages of regionalization substantially outweigh the advantages. Greatest weight should be given to the risk of causing harm to two functioning districts without obtaining sufficient corresponding benefits. The whole will not necessarily be better than the sum of its parts. It is difficult to imagine forcibly merging two such different high schools without provoking much turmoil and acrimony. Call them "challenges" or "short-term" adjustments if one likes, but nevertheless the disadvantages resulting from

> regionalization would divert the energies of administrators and teachers from their main job of educating children. Even if one accepts the Englewood Board's contention that the cost estimates of the Tenafly witnesses are grossly exaggerated, the money still would be better spent on improving educational opportunities in the existing districts. As previously indicated, the decision on what is the right course of action must not be based on fear of local opposition to the law. But if the main rationale for the regionalization remedy is to improve racial balance in both schools, then the Englewood Board has not put on a very convincing case that regionalization is the best solution. If the desegration literature teaches us anything, it is that forced merger of two districts, one predominantly white and one predominantly black, carries the greatest risk of white flight.

The ALJ also rejected a dual sending-receiving relationship between Englewood, Cliffs and Tenafly because it would afford only Cliffs' parents the choice of DMHS or THS, and would deny Englewood parents the same remedy.

H. *The Commissioner's Decision*

On appeal, the Commissioner approved the ALJ's factfinding and his legal conclusions. In so doing, he reaffirmed the issue of racial balance as one of "utmost importance to the State":

> [S]everance of the sending-receiving

relationship between the Englewood Cliffs Board and the City of Englewood Board would have a significant negative impact on racial balance notwithstanding the small number of white students from Cliffs in attendance due to the unfortunate trend of the Cliffs parents to withdraw their children from the Cliffs resident enrollment to avoid placement at DMHS. As small as that number of students is, their withdrawal would in fact have a substantial negative impact for although the loss of 15 white Cliffs students would lessen the overall white percentage of students from 11.8 to 10.6%, that loss would reduce the number of white students by 16.0% (15/94) presently at DMHS and in 1990-1991 the percentage decrease would be approximately 25.0%.

. . . .

[T]he Commissioner is at this juncture compelled to put to rest once and for all the belief that because painfully few white students remain in a school due to a pattern of withdrawal by members of the majority of the school community there can be no significant negative impact on racial composition. Thus, not just the few remaining will be considered but the pool of eligible students as well who have withdrawn for whatever reason be it to private school, parochial school or, in this particular case, to a public high school in another community as well. If the State were to

> limit its consideration to 3 students as the Cliffs Board would have us do, it would be for all intents and purposes rewarding, not combating the withdraw that has occurred. If such were to be allowed, the sending district would merely have to wait until enrollment is so devastatingly low that it could then argue that because so few students attend the receiving district, withdrawal can't possibly make a difference. This cannot be permitted.
>
> In 1978-79 approximately 60.0% of Englewood Cliffs' students attended DMHS. In the intervening years obvious and dramatic decline in enrollment of Cliffs students at that school has occurred for reasons which, given the circumstances of this matter, must be attributed in large part to what is known in the field to be "white flight." For the Commissioner at this juncture to grant severance to the Englewood-Englewood Cliffs sending-receiving relationship as a matter of public policy would place an imprimatur of acceptance by the State to this flight. (citations omitted).

The Commissioner also agreed with the ALJ's conclusion that a substantial negative educational impact would result from withdrawal:

> One need look no further than the United States Supreme Court decision in *Brown v. Topeka,* [347 *U.S.* 483, 74 *S.Ct.* 686, 98 *L.Ed.* 873

(1954)] to support the ALJ's reliance upon evidence dealing not only with "material loss," *i.e.*, reduction in course offering, effect on curriculum, loss of teaching staff, but also an assessment of impact on the psychosocial dimension of education referred to in this case as "symbolic loss." Notwithstanding the fact that DMHS is not all minority, it is, as previously stated, substantially imbalanced racially; thus, the following passage from the U.S. Supreme Court in *Brown* has no less bearing in this matter than if DMHS were all minority. It states:

> Segregation . . . in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.
>
> . . . .

[T]he Commissioner rejects the Cliffs Board's arguments that attempt to justify severance because DMHS was an inferior educational facility at the time the petition was filed and

> should not, therefore, be held harmless from that. It is clear from the record that this case has been heavily immersed in an effort to cast DMHS as an inferior school, not worthy of its students. It is equally clear that the record does not support this position.

As to the Tenafly tuition policy, the Commissioner agreed with the ALJ that while it did not violate the law, it is "clearly contrary to public policy . . . and cannot be allowed to stand":

> Although the policy is, on its face, not discriminatory and although it was not adopted for improper motives, this does not mean that it should be allowed to stand insofar as the Cliffs and Englewood Boards are concerned, for the record has made it abundantly clear that the effect of the policy has been exactly what the ALJ denounces, namely, to exacerbate racial imbalance at DMHS by skimming off and luring students who are eligible to attend DMHS. Thus, in that sense it is "repugnant" and a "beggar-thy-neighbor" policy as it affects DMHS.

The Commissioner also concurred with the ALJ that:

> [I]t is of no moment that Cliffs parents in this matter have no intentions of sending their children to DMHS. Under *Pierce v. Society of Sisters,* [268 *U.S.* 510, 45 *S.Ct.* 571, 69 *L.Ed.* 1070 (1925)] they are free to send their children to private or parochial school and that

> right is in no way infringed upon by this decision. There is no right, however, to use *N.J.S.A.* 18A:38-3 as a mechanism which directly and substantially contributes to racial imbalance at DMHS.

Like the ALJ, the Commissioner rejected the dual sending-receiving relationship in particularly direct terms:

> Such a relief would certainly serve to legitimize what has been found to be impermissible in this case, namely, the flight of 76 Cliffs students to THS which has contributed to the serious racial imbalance at DMHS. The establishment of a dual sending-receiving relationship would in essence give legal/State sanction to such flight which must be combated not facilitated. Just as severance of a sending-receiving relationship will not be permitted if substantial negative impact results, neither shall a dual sending-receiving relationship be approved when substantial negative impact results. Allowing Cliffs parents to select between THS and DMHS would only serve to exacerbate on existing serious racial imbalance at DMHS and would impact on educational quality in the same manner as severance.
>
> Further, the Cliffs Board is wrong in its assertion that the flight of Cliffs students has been exonerated because educational reasons for severance were found to have been advanced by the Cliffs Board. As previously

> stated, no one could seriously believe that racial prejudice and circumvention of integration is not at play in this case. Thus, the Commissioner again emphasizes that even if legitimate educational reasons are advanced for severance or the establishment of a dual sending-receiving relationship, neither will be granted where compelling reasons, such as substantial negative impact on racial composition and educational quality, as herein, outweigh the educational benefits sought by the sending district in a new relationship with another district. While finding that educational reasons existed for the Cliffs Board's request for severance in this matter, such acknowledgment does not detract from the ALJ's determination and the Commissioner's affirmance that DMHS provides a broad, comprehensive educational program which is both thorough and efficient and capable of providing more than adequate preparation for post-secondary education.

The Commissioner rejected regionalization as a remedy because he determined that Englewood failed to meet the criteria enunciated in *Jenkins* that:

> (1) "a single community" exists between (or among) the districts in question; (2) regionalization is "entirely 'reasonable, feasible, and workable' "; and (3) regionalization can be accomplished "without any practical upheavals." *Jenkins, supra,* [58 *N.J.* at 505, 279 *A.2d* 619].

Appendix B

The Commisioner's final order was as follows:

> Based on the significant negative impact on racial composition and educational quality that would result if the sending-receiving relationship between the Cliffs Board and the City of Englewood Board were allowed to be severed, the petition for termination filed by the Cliffs Board is hereby denied. Also denied is its request to establish a dual sending-receiving relationship with the Tenafly Board as this would likewise create significant negative impact on racial balance and educational quality.
>
> It is further ordered that the Tenafly Board of Education cease and desist from admitting to its high school on a tuition or other basis any students who are residents of either Englewood or Englewood Cliffs. While the tuition policy on its face is not illegal, the effect under the circumstances of this matter is to exacerbate the precarious racial imbalance at DMHS; thus, the strong State policy against discrimination and segregation must have primacy over any discretionary power granted to a board by *N.J.S.A.* 18A:38-3. [*Bd. of Educ. of Asbury Park v. Bds. of Educ. of the Shore Regional High School District,* 1971 *S.L.D.* 221 (1971). *aff'd,* 1971 *S.L.D.* 228 (1971)]. The injunction does not apply to resident students from those districts who were enrolled in *and* attending either THS or eighth grade in

the Tenafly School District on the date of the initial decision in this matter, April 18, 1988. Nor does it apply to any grade level other than that currently or in the future served by THS except that no Englewood or Englewood Cliffs resident student so attending Tenafly in a grade lower than those of its high school shall be allowed to attend THS when he/she reaches that level of schooling. This ruling fully disposes of the issues raised in the Cliffs Board's Motion for Interim Relief submitted on behalf of eighth grade students who were accepted for admission to Tenafly High School for the 1988-89 academic year.

Moreover, the Englewood Board's cross-petition for forced regionalization is denied for failure to demonstrate circumstances comparable to those in the State Supreme Court's decision in *Jenkins, supra.*

I. *The State Board Decision*

After receiving the recommendations of its Legal Committee, the State Board reviewed the ALJ's findings as adopted by the Commissioner and essentially agreed with the other fact finders that DMHS offered students a good education which prepared them for college and later life. The State Board also agreed with the ALJ and the Commissioner that termination of the sending-receiving relationship would result in a substantial negative impact on racial balance and education at DMHS. The State Board determined that the loss of 21 Cliffs' students (15 white, 4 Asian, 2 Hispanic) would decrease the DMHS white population by only 1.6%. Apparently troubled by this figure, it said:

> Viewed in isolation at that particular point in time, this change [a loss of 21 Cliffs students] might not in itself constitute a substantial negative impact on the racial composition of the student population attending Dwight Morrow. Nor, as set forth in the decisions below, would the loss of the 21 Englewood Cliffs students have affected the structure or substance of the educational program provided by Dwight Morrow.
>
> Thus, were the circumstances of this case so limited, we might have reached a conclusion different than the Commissioner's. However, *N.J.S.A.* 18A:38-13 requires that any determination with respect to a requested change in designation must be based upon consideration of "*all* the circumstances" (emphasis added), and, consequently, the language of the statute precludes us from taking such a narrow view.

The State Board thus decided to approach the issue from a broader perspective than the ALJ and the Commissioner, and examined the effect of the THS tuition program and the migration of Cliffs students over a period of years. Had Cliffs requested termination in 1982, the year THS initiated its tuition plan when only 11 Cliffs' students attended THS, severance from DMHS would have involved 119 students instead of 21, and would have resulted in a 6.5% decrease in white students at DMHS as opposed to the 1.6% decrease of 1987-1988.[4] Under those circumstances, the State

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4. Cliffs argues that the State Board decision was based upon the (Cont'd)

Appendix B

Board would not have permitted severance in 1982-1983 "absent a compelling reason."

Although it noted that "there [was] no fixed balance between racial and national origin groupings that, from an educational perspective, [could] be considered ideal for all communities" the State Board concluded that:

> [T]o sanction termination of the sending-receiving relationship between Englewood and Englewood Cliffs, we would be condoning a concentration of blacks and Hispanics that is sharply out of balance with the composition of the society in which those students must function. *See Booker v. Bd. of Educ. of Plainfield*, 45 *N.J.* 161 [212 *A.2d* 1] (1965). Further, the concentration of minority students

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(Cont'd)

misimpression that 119 Cliffs' students attending DMHS in 1982 were white when in fact only 100 (119 x .84) were white. One hundred is the correct figure. The State Board opinion indicated that if all 119 Cliffs' students had left DMHS in 1982 a 6.5% decrease in the white student body would have resulted. Despite this arguably misleading reference, it is clear that the State Board actually used the correct figure in calculating the percentage decrease in white DMHS students at 6.5%:

> Total DMHS students (1982): 1,128
> Total white DMHS students (1982): 355
> Total white Cliffs students at DMHS (1982): 100
> (1) Percent DMHS white population with Cliffs white students:
> 355 of 1,128 = 31.5%
> (2) Percent DMHS white population without 100 Cliffs white students:
> 25[illegible] of 1,028 = 25.0%
> (3) Percent decrease (i.e., (1) minus (2)) = 6.5%

> would be at such level as to allow Dwight Morrow to be characterized as a minority school with the attendant "sense of stigma and resulting feeling of inferiority" cited by the Court in *Booker* and upon which the *Brown* decision rests.

It therefore denied Cliffs' petition for severance because of the "balance between racial and national origin groupings that would exist" in the wake of termination, and "the negative educational implications" for DMHS which would necessarily follow severance:

> [A]s a matter of educational policy, we could not condone the level of concentration of minority students attending Dwight Morrow by sanctioning the change in designation sought here. In this respect, we emphasize that:
>
> > Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to improvement of education for all.
>
> New Jersey State Board of Education, A Statement of Educational Policy, November 7, 1969.

The State Board also denied the application for the establishment of a dual sending-receiving relationship, which would have

allowed Cliffs the option of DMHS or THS, essentially for the same reasons. According to the State Board, merely denying Cliffs' petition would not reverse or correct the increasing trend toward greater racial imbalance at DMHS. Since 1982, the year Tenafly initiated its tuition program, there had been a steady increase in the number of white Cliffs and Englewood students who chose to attend THS rather than to attend DMHS or private schools and, according to the State Board, as a result of that trend the proportion of DMHS minority (black and Hispanic) population rose from 65.8% in 1982-1983 to 84.0% by 1987-1988. At the same time, the THS white pupil population was 80.7% white and only 1.5% black or Hispanic.

The State Board concluded that there was a cause and effect to this trend. Although it found that Tenafly had not initiated the tuition program with a discriminatory intent, it opined that its powers were not limited to cases involving evil motives. Acknowledging that it had no affirmative obligation to redesign school districts in order to establish racial balance, the State Board reasoned that because Cliffs had effectively raised the issue, it must either address the question of reversing the trend or accept a role in perpetuating the accelerating racial imbalance by its failure to act. Under the circumstances, the State Board determined that it had a duty to institute measures designed to ensure that high schoolers from Cliffs and Englewood would attend DMHS, their assigned school, if they attended any public high school. In order to discharge that duty, it restrained Tenafly and all other public school districts from accepting Cliffs or Englewood high-schoolers even though no other public school districts had sought to participate in this case. At the same time, it directed Cliffs and Englewood to develop a plan to encourage parents of the two districts to send their children to DMHS. The State Board felt that these mildly intrusive remedies had at least the potential for efficacy.

Appendix B

In reviewing the Commissioner's denial of Englewood's cross-petition for compulsory regionalization or for a regionalization study, the State Board laid to rest the Commissioner's suggestion that regionalization may only be directed in cases where the districts constitute a "single community." Instead, it opined that, based upon the State Constitution and implementing legislation, it clearly had the power to order multi-community regionalization where "necessary to vindicate our State's policy against segregation, and where to do so was 'reasonable, feasible and workable' " (quoting *Jenkins, supra,* 58 *N.J.* at 505, 279 *A.2d* 619). Nevertheless, the State Board refused to exercise its power to order regionalization "at this juncture." It concluded that Englewood had failed to show that remedies short of regionalization would not be effective.

Acknowledging that it could not compel students to go to public as opposed to private schools, the State Board noted that had the Cliffs and Englewood students attending THS in 1987-1988 attended DMHS, their designated school, the DMHS student population would have been multi-racial and multi-cultural even if not equally balanced (*i.e.,* 16.0% white, 62.0% black, 16.0% Hispanic and 6.0% Asian). Because such a student population mix might afford DMHS students the educational advantages of a heterogeneous student population, the State Board focused its remedy on ensuring that high schoolers from Englewood and Cliffs would attend DMHS if they attended any public school. As an example of the potential of its remedy, the State Board referred to the lack of evidence that Englewood and Cliffs' parents were increasingly sending their high-school-aged children to private schools, which led it to conclude that a remedy which required those children to attend their designated school, if they attended any public high school, would likely be effective. However, because it recognized that it had a responsibility to correct the

growing racial imbalance at DMHS and that its remedies might not sufficiently improve the racial balance of DMHS in the long run, it directed the Commissioner to monitor the composition of the DMHS pupil population for five years and to report annually as to the effectiveness of its remedy. Cliffs appealed and Englewood cross-appealed.

J. *The Regionalization Study*

On June 5, 1991, the Commissioner made his first report to the State Board. He outlined the proposals of each of the districts and an enhanced compromise plan. In so doing, he found that the situation at DMHS was on a downward slide:

> Perhaps the clearest indicator of the deterioration in the relationship between Cliffs and Englewood is the enrollment figures for Cliffs students in attendance at DMHS. In the 1982-83 academic year, 119 Cliffs students attended DMHS. That figure fell to: 92 for the 1983-84 academic year, 73 for the 1984-85 academic year, 60 for the 1985-86 academic year, 34 for the 1986-87 academic year, 23 for the 1987-88 academic year, 13 for the 1988-89 academic year, 16 for the 1989-90 academic year and 13 for the 1990-91 academic year. With the exception of the negligible increase seen in 1989-90, there has been a steady decline in the number of Cliffs students attending DMHS each year. In fact, only 8 or 9 Cliffs students are projected to attend DMHS in 1991-92.

Appendix B

> Cliffs' graduating eighth graders are obviously not attending DMHS. In 1987, out of a potential class of 45, only 3 students went to DMHS. In 1988 the respective figures were 30 and 5; in 1989, 42 and 2. In 1990 Cliffs had 38 8th graders; 1 went to DMHS. This year Cliffs has 32 eighth graders in its school; none have elected to matriculate at DMHS in the fall.
>
> Significantly, the decline in Cliffs' student enrollment in DMHS is not attributable to a concomitant decrease in Cliffs' own student population. Moreover, since Cliffs' student population is primarily white and Asian, it is those groups which are severely under represented at DMHS.

The Commissioner noted the "evident reluctance" of the parties to resolve the dispute over the plans which spoke "volumes." He therefore recommended a comprehensive nine-point plan emphasizing early grade level exchanges between the districts as a way of increasing respect among the students and promoting better understanding of the DMHS programs, in order to lay the groundwork for increased enrollment of Cliffs' students at DMHS. Because the districts had been unable to stance the flow of Cliffs' students into placements other than DMHS, the Commissioner also recommended that a regionalization study be undertaken by a consulting firm selected by the Department of Education to work under the guidance and supervision of the Bergen County Superintendent of Schools. "The regionalization study should explore the potential for establishing a regional school district including Cliffs, Englewood and Tenafly by examining potential configurations, available facilities, transportation options, racial impact, and fiscal considerations."

Appendix B

The State Board accepted these recommendations in its July 3, 1991 resolutions but modified the scope of the proposed regionalization study to "include all potential configurations K-12 which would achieve the State's policy by correcting, among other things, the imbalance of racial and national origin groupings" at DMHS "as expeditiously as possible." By our leave, Cliffs and Tenafly appeal from this resolution.

III

The starting point for any discussion of the issues involved in this case is the State's fundamental policy in favor of equal educational opportunity. Since 1875, the New Jersey Constitution has mandated that:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

N.J. Const. art. VIII, § 4, ¶ 1. Public education must enable the least advantaged school child to compete, on a fair basis, with the most advantaged. *Abbott v. Burke*, 119 *N.J.* 287, 374-75, 575 *A.2d* 359 (1990); *Robinson v. Cahill*, 62 *N.J.* 473, 513, 303 *A.2d* 273 (1973), *cert. denied*, 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.2d* 219 (1973). Such a scheme will not tolerate discriminatory treatment. Over a century ago, our Legislature first expressed this policy against discrimination in public education. *L.*1881, *c.* 149, codified as *N.J.S.A.* 18A:38-5.1. Later, the delegates to our constitutional convention made the policy a fundamental right in the Constitution of 1947:

Appendix B

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

N.J. Const. art. I, ¶ 5. The Legislature has consistently resounded this theme in enactments, including the New Jersey Law Against Discrimination which proscribes discrimination in "any kindergarten, primary and secondary school, . . . high school, . . . or any education institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey." *N.J.S.A.* 10:5-5(*l*); *see also N.J.S.A.* 18A:36-20; *N.J.S.A.* 18A:7A-4.

The Commissioner of Education has been "vested with broad power to deal with the subject," *Booker v. Bd. of Educ. of Plainfield,* 45 *N.J.* 161, 173-74, 212 *A.2d* 1 (1965), because of the educational importance of eradicating segregation and discrimination in the public schools:

> In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational

> advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. [45 *N.J.* at 170-71, 212 *A.2d* 1].

Booker reprised an earlier pronouncement of our Supreme Court on the educational importance of racial ballance. In *Morean v. Bd. of Educ. of Montclair,* 42 *N.J.* 237, 200 *A.2d* 97 (1964), in which a lottery reassignment program the Commissioner instituted in place of neighborhood school assignment was affirmed, the court recognized the harm done to white *and* minority children by racial segregation, announcing that sound education and legal principles do not allow for segregation "with its inherent inequalities of educational opportunities and its withholding of the democratic and educational advantages of heterogeneous student populations." *Id.* at 242-43, 200 *A.2d* 97 (citations omitted).

These principles were restated in *Jenkins v. Tp. of Morris School District and Bd. of Educ., supra,* where Morris Township applied to terminate its sending-receiving relationship with Morristown in order to establish its own high school. Although the Commissioner had the power to deny termination under *N.J.S.A.* 18A:38-13, he held that the statute had no application " 'once a school district provides its own high school facilities' " as Morris Township proposed to do. *Jenkins,* 58 *N.J.* at 503, 279 *A.2d* 619. The Supreme Court rejected the Commissioner's restriction on his authority:

> The Commissioner has been appropriately charged with high responsibilities in the educational field and if he is faithfully to

> discharge them in furtherance of the State's enlightened policies he must have corresponding powers. The Legislature has here granted them in broad terms and it would disserve the interests of the State to permit their administrative narrowing which in effect represents not only a disavowal of power but also a disavowal of responsibility. [*Id.* at 504, 279 *A.2d* 619].

The Court went on to recall its opinion in *Booker* where "we sympathetically applied our constitutional and statutory policies towards the elimination of racial segregation or imbalance." *Jenkins*, 58 *N.J.* at 496, 279 *A.2d* 619.

In *Jenkins*, the Court not only ruled that the Commissioner erred in refusing to take suitable steps toward preventing Morris Township from withdrawing its students from Morristown High School, but also held that *de facto* segregation, resulting from a concentration of minorities in particular schools as compared to their concentration in the schools of nearby districts, warranted the Commissioner to move "towards effectuating a merger of the Morris Township and Morristown school systems." 58 *N.J.* at 504, 279 *A.*2d 619. More particularly, the Court held that to vindicate the state policy against segregation, "governmental subdivisions . . . may readily be bridged . . ." and unwilling districts regionalized. *Id.* at 500, 279 *A.2d* 619. In so doing, the Court opined "that whether or not the federal constitution compels action to eliminate or reduce *de facto* segregation in the public schools, it does not preclude such action by state school authorities in furtherance of state law and state educational policies." *Id.* at 498-99, 279 *A.2d* 619 (citations omitted). It is this "long-standing" and "vigorous" state policy (*Booker, supra*, 45 *N.J.* at 173, 212 *A.2d* 1) which provides the backdrop for our legal analysis.

Appendix B

IV

This is an appeal from the decision of a state administrative agency. Through the comprehensive opinions of the ALJ, the Commissioner and the State Board, the issues presented here have been thoroughly, explored by the officials in whom authority over our educational system reposes. *See N.J.S.A.* 18A:4-1 to -40; *N.J.S.A.* 18A:6-9, :6-25 to -28; *N.J.S.A.* 52:14F-1 to -11. *See also Hinfey v. Matawan Regional Bd. of Educ.*, 77 *N.J.* 514, 525, 391 *A.2d* 899 (1978); *In re Tenure Hearing of Tyler,* 236 *N.J. Super.* 478, 484-85, 566 *A.2d* 229 (App. Div. 1989), *certif. denied,* 121 *N.J.* 615, 583 *A.2d* 315 (1990); *Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken,* 204 *N.J. Super.* 508, 512-13, 499 *A.2d* 523 (App. Div. 1985); *Theodore v. Dover Bd. of Educ.*, 183 *N.J. Super.* 407, 412-13, 444 *A.2d* 60 (App. Div. 1982); *Piscataway Tp. Bd. of Educ. v. Burke,* 158 *N.J. Super.* 436, 441, 386 *A.2d* 439 (App. Div.), *appeal dismissed,* 79 *N.J.* 473, 401 *A.2d* 230 (1978). Like other administrative decisions, this one is entitled to our deference:

> In passing on an administrative agency's exercise of statutorily-delegated responsibility, we accord it a strong presumption of reasonableness. We may not substitute our judgment for the wisdom of agency action if that action is statutorily authorized and not arbitrary or unreasonable. As long as the action is within the fair contemplation of the enabling statute, that action must be accorded a presumption of validity and regularity. If there is any fair argument in support of the agency's action or any reasonable ground for difference of opinion among intelligent and conscientious

> officials, "the decision is conclusively legislative, and will not be disturbed unless patently corrupt, arbitrary or illegal." Where special expertise is required, as in this case, an even stronger presumption of reasonableness exists. [*IFA Ins. Co. v New Jersey Dep't of Ins.*, 195 *N.J. Super.* 200, 207-08, 478 *A.2d* 1203 (App. Div.), *certif. denied*, 99 *N.J.* 218, 491 *A.2d* 712 (1984) (quoting *Flanagan v. Civil Service Dep't*, 29 *N.J.* 1, 12, 148 *A.2d* 14 (1959)) (citations omitted)].

See also In re Tenure Hearing of Tyler, supra, 236 *N. J. Super.* at 484, 566 *A.*2d 229; *Bd. of Educ. of Merchantville, supra*, 204 *N.J. Super.* at 512, 499 *A.*2d 523. An agency's excercise of statutorily delegated responsibility is accorded an even stronger presumption of validity where, as here, it has been given discretion to determine the specialized procedures for its tasks. *Van Dalen v. Washington Tp.*, 120 *N.J.* 234, 244-45, 576 *A.2d* 819 (1990).

It is true that, where an issue is purely one of law, we normally do not accord the same deference to the agency determination. *Parsippany-Troy Hills Educ. Ass'n v. Bd of Educ. of Parsippany-Troy Hills Tp.*, 188 *N.J.Super.* 161,165, 457 *A.*2d *15* (App. Div.), *certif. denied*, 94 *N.J.* 527, 468 *A.*2d 182 (1983). However, it is equally true that where an agency is responsible for enforcing a statute, its interpretation will "be accorded considerable weight" on appeal. *Bd. of Educ. of Merchantville, supra*, 204 *N.J. Super.* at 512, 499 *A.*2d 523 (citing *Service Armament Co. v. Hyland*, 70 *N.J.* 550, 561, 362 *A.*2d 13 (1976)).

It goes without saying that an agency's factual determinations are presumptively correct and will not be upset absent a showing that they are arbitrary, capricious or unreasonable. *Bd. of Educ. of*

Appendix B

Branchburg v. Bd. of Educ. of Somerville, 173 *N.J.Super.* 268, 274, 414 *A.*2d 259 (App. Div. 1980) (citing *Thomas v. Bd. of Educ. of Morris Tp.*, 89 *N.J. Super.* 327, 332, 215 *A.*2d 35 (App. Div. 1965), *aff'd*, 46 *N.J.* 581, 218 *A.*2d 630 (1966)). Such determinations must be accepted by us if supported by substantial credible evidence. *Matter of Warren*, 117 *N. J.* 295, 296-97, 566 *A.*2d 534 (1989); *In Re Petition of Hackensack Water Co.*, 249 *N.J. Super.* 164, 174, 592 *A.*2d 250 (App. Div. 1991); *Thomas v. Bd of Educ. of Morris Tp., supra*, 89 *N.J. Super.* at 332, 215 *A.*2d 35.

In light of these standards, and upon a complete review of this record,[5] we have concluded that the determinations of the State Board that severance should be denied because it would result in a substantial negative impact at DMHS; that a dual sending-receiving relationship should be denied for the same reason; that across the board injunctions were required to reverse the trend of

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5. Englewood asserts that the State Board erred by failing to supplement the record with minutes of a Cliffs Board meeting at which there was "disclosure" that Cliffs' attempt to sever the sending-receiving relationship was racially motivated. According to two local newspaper articles from July 1988, at a closed meeting the president of the Cliffs Board of Education stated that this lawsuit was unwinnable and that "[Cliffs] will have lost the case, and it is a racial issue." Because it claims that the minutes are, in effect, already public, Englewood argues that there is no cause for not fully disclosing them and making them part of this record. Neither the State Board's opinion nor Englewood's brief refer to this issue as having been raised previously and, in fact, although Englewood cites *R.*2:5-5(b), it has apparently made no formal motion to supplement the record, thus rendering this issue improperly before us on this appeal. Even if we were to reach the merits, we would decide it against Englewood. According to the news article, Cliffs' president said that this "is a racial issue." That declaration is no more "an admission" of Cliffs' racial motivation than it is a comment on the public perception of the case. More importantly, Englewood does not claim that the minutes were voluntarily disclosed, and Cliffs has set forth credible and uncontradicted evidence that the statement, if made, was made during a litigation strategy session with its attorney and was therefore privileged. *See N.J.S.A* 10:4-12 to -13. There is thus no warrant for supplementation.

accelerating imbalance at DMHS; and that a regionalization study should be implemented, were based upon "sufficient credible evidence on the record as a whole" and should be affirmed. *R.* 2:11-3(e)(1)(D); *see also Thomas v. Bd. of Educ. of Morris Tp., supra,* 89 *N.J. Super.* at 332, 215 *A.*2d 35.

V

Pursuant to *N.J.S.A.* 18A:38-11, "[t]he board of education of every school district which lacks high school facilities within the district . . . shall designate a high school or high schools . . ." outside of the district for the education of its high school age pupils. This "sending-receiving relationship" is a contract between the two districts for educational services to be provided in exchange for a fixed tuition payment. *See N.J.S.A.* 18A:38-8. Unlike an ordinary contract, however, termination of a sending-receiving relationship is subject, not just to the desires of the parties, but also to the approval of the Commissioner of Education:

> No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law, shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the commissioner. . . . [*N.J.S.A.* 18A:38-13].

The point of requiring the Commissioner to approve severance is obvious: to avoid a situation in which a long-standing sending-receiving relationship could be terminated at the whim of one district to the detriment of the other. Implicit in the statute is a

stability principle—a recognition of the fact that, in engaging over the long-term in a sending-receiving relationship, school districts achieve something of an angle of repose which should not lightly be placed into disequilibrium, at least not without an objective review of the consequences of the proposed action. It is the Commissioner who brings to bear his expertise in evaluating a severance request.

We have previously recognized the significance of the Commissioner's role in a sending-receiving context in our decision in *Bd of Educ. of Moorhaventille, supra*. That case involved a sending-receiving termination request which the Commissioner and the State Board denied. 204 *N.J. Super.* at 510-11, 499 A.2d 523. In reviewing the termination of a fixed-term sending-receiving relationship, pursuant to *N.J.S.A.* 18A:38-20, we broadly interpreted the Commissioner's supervisory role:

> *Reading N.J.S.A.* 18A:38-13 in the context of the Commissioner's expansive powers satisfies us that it was intended to provide the Commissioner with continuous supervisory powers over all sending-receiving relationships, whether created by fixed-term contracts or not, to provide stability to such relationships by permitting their dissolution only for good and sufficient reason. [204 *N.J. Super.* at 515, 499 A.2d 523].

Although the Legislature amended the statute after *Moorhaventille*, the amendment in no way restricted the important position of the Commissioner in . . . decision-making process.[6]

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6. The Commissioner's decision is subject to appeal to the State Board of Education which "may in its discretion affirm, reverse, revise or modify the determination appealed from." *N.J.S.A.* 18A:38-28.

Appendix B

In assessing whether to grant severance, the Commissioner is called upon to consider the legislative mandate of W.J.S.A. 119.16 (8) (b) 15:

> Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.

Prior to 1988, W.J.S.A. 119.16 (8) (b) provided that a sending-receiving relationship could only be severed upon a showing of "good and sufficient reason" with the burden of proof squarely on the petitioning district. *Bd. of Educ. of Haworth v. Bd. of Educ. of Demarest*, 1968 (SEC) S.L.D. 40, 43 (1968). In amending the statute, the Legislature omitted the "good and sufficient reason" standard and substituted the "no substantial negative impact" rule. According to the statement of the amendment's sponsor, its purpose was to

Appendix B

> [M]odify the standard to be applied by the Commissioner of Education when a local board of education applies for permission to alter or terminate a sending-receiving relationship with another board .... The commissioner is required to grant the requested change in designation or allocation if no substantial negative impact will result. *[Assembly Statement accompanying Assembly Bill No. 2072, L.*1986, *c.* 156 (1986)].

The Assembly Education Committee Statement accompanying the bill points out that the old law "does not specify the criteria which the commissioner should consider in making a judgment" on severance, but that the new law requires that he consider many factors, including the racial composition of the schools and the educational impact of severance. *Assembly Education Committee Statement accompanying Assembly Bill No. 2072, L.*1986, *c.* 156 (1986). In prior decisions, the State Board has held that the amended statute "does not represent a departure from the legislative policies embodied in the statutory scheme . . . prior to [the] amendment . . . but rather gives further definition to the balance between those policies." *Bd. of Educ.* of *Cranbury v. Bd.* of *Educ. of Lawrence,* 1987 *S.L.D.* 1, 24 (1987), *appeal dismissed,* No. A-4253-86 (App. Div. April 28, 1988) (citation omitted).

The spin Cliffs places on the amendment is that it was designed to make termination of a sending-receiving relationship "easier" to obtain; it argues that the State Board erred in not according it the benefit of this amelioration. The source of this interpretation is apparently a newspaper article published contemporaneously with the bill's enactment:

> "This law will make it easier for . . . school

> districts to terminate an agreement once another district no longer best fits its needs." [Pat R. Gilbert, *New Law Enables Schools to End 'Sending' Pacts, Trenton Times,* November 25, 1986 (quoting the legislative sponsor)].

We see a distinct difference between the original law and the amended version. Under the former, the Commissioner could reject severance if he was not satisfied that there were "good and sufficient reason[s]" to justify it. The amendment provides that he "shall" grant severance "if no substantial negative impact will result." We can conceive of circumstances (for example, where a petitioning district has weak reasons for severance but where no substantial negative impact will occur) in which the new version of the statute would constitute a lesser burden on the movant than the old. However, whether the new law is or is not "easier" essentially begs the question presented here—was it arbitrary or unreasonable for the State Board to conclude that the grant of severance would result in a substantial negative impact on DMHS? Cliffs argues that it was, contending that, other than the negative racial impact on DMHS, there are no additional negative impacts presented by termination, and that if the State Board had "weighed" the positive impacts of severance against the single negative racial impact, it would have concluded that the statutory burden was met. This argument is wide of the mark in several respects.

First, Cliffs' vision of a positive impact is quite different from our own. It claims, for example, that two positive impacts of severance are the forestalled deterioration of the Cliffs' upper school from which Cliffs' parents have historically removed their children to assure them places in alternatives to DMHS, and the availability to Cliffs' students of the "superior academic

environment" of THS. Each of these so-called affirmatives is exclusively beneficial to Cliffs and fails to give a shred of consideration to the effect of severance on the students at DMHS. More importantly, the THS formula for educational success is to segregate a group of homogeneous students from relatively affluent families in a school run completely by white teachers which stresses college preparation and does not even provide a full spectrum of special education programs for the students who require them. This scheme utterly fails to account for the considerable value which we have long placed on social and educational development in an atmosphere in which children with differences learn to celebrate and not fear them. *Booker, supra,* 45 *N.J.* at 170, 212 *A.*2d 1. THS, with its minuscule black and Hispanic population, is not a realistic forum for interaction among the children of different races. On the other hand, DMHS, which every factfinder has held to be a *very* good school, provides its education within such a heterogeneous framework. Thus Cliffs' positive impacts claim is problematic at best.

Moreover, even if we were to concede Cliffs' vision of what is positive, the result would be the same. Whatever differences exist between the old law and the new, one thing is certain—*N.J.S.A.* 18A:38-13 is not a traditional balancing statute. *See Bd. of Educ .of Belmar v. Bd. of Educ. of Asbury Park* 1989 *S.L.D.* 1, 96 (1989); *Bd. of Educ. of Absecon v. Bd. of Educ. of Pleasantville,* 1988 *S.L.D.* 14, 45 (1988); *Bd. of Educ. of Cranbury v. Bd. of Educ. of Lawrence, supra,* 1985 *S.L.D.* at 17. The act lays out a series of factors to be considered by the Commissioner as part of a feasibility study including the educational (offerings) and financial (budgetary) implications for *both* districts, the impact on the quality of education in *both* districts, and the effect on the racial composition of the pupil population in *both* districts. The Commissioner's responsibility is to reach an "equitable" determination-one that is fair to both districts—keeping in mind

his responsibility as the ultimate educational authority in the State. *See N.J.S.A.* 18A:38-13. To be sure, the Commissioner may engage in weighing and balancing within each of the stated categories. For example, he may assess whether financial losses outweigh financial gains in a proposed move or whether racial balance is improved in one district more than it is negatively affected in the other. However, he is not free to weigh the overall positive and negative impacts of severance or to determine that a substantial negative impact he has found in any category is "outweighed" by a positive impact in another. The reason for this is that the legislatively prescribed considerations do not exist in a vacuum but are inextricably bound up with the question of what kind of an education is to be provided. A substantial negative impact in one category necessarily implicates an overall educational quality issue. The focus of the Commissioner's inquiry is whether a substantial negative impact exists *at all*, if it does, severance is to be denied. This is the way the Commissioner and the State Board have previously interpreted the statute. *Bd. of Educ. of Asbury Park, supra,* 1989 *S.L.D.* at 96; *Bd. of Educ. of Absecon, supra,* 1988 *S.L.D.* at 45. There is simply no place in this analysis for the weighing of positive impacts once a substantial negative impact has been found. *See Bd. of Educ. of Asbury Park, supra,* 1989 *S.L.D.* at 9-10 (ALJ), 96 (Commissioner).

Cliffs alternatively argues that the State Board could not reasonably have concluded that a substantial negative impact would result from severance because this record shows that a grant of severance would have caused no more than a 1.1% reduction in the DMHS white population at the time of the application. One prong of this argument is that the State Board should not have reached back into the relationship between the parties in assessing Cliffs' application. Not so.

Appendix B

Although the State Board was not compelled to approach the case from this perspective, it was well within its discretion in doing so. What occurred prior to the actual petition for severance provided a perspective which the State Board legitimately viewed as critical to an understanding of the present state of affairs and to an assessment of the effects of withdrawal. In deciding cases in the past, the State Board has never ignored circumstances which have contributed materially to a situation under review. *See, e.g., In re Bd. of Educ. of Milltown to Terminate its Sending-Receiving Relationship with the Bd. of Educ. of New Brunswick,* 1976 *S.L.D.* 854, *aff'd,* 1976 *S.L.D.* 863, *appeal dismissed,* No. A-2456-74 (App. Div. December 2, 1976). There was certainly no reason for it to do so in this case in which the facts relied on by the State Board were not "history" at all, but reality—that Cliffs began its withdrawal from DMHS long before it filed its application with the Commissioner. Indeed, if we were to accept Cliffs' approach to the issue, a district would be rewarded for quiet complicity in long-term white flight with a payoff for delayed discovery: the inability of the State Board to consider what had already occurred in formulating its remedy.

Having taken the long view, the State Board's conclusion that the negative impact was substantial, as a matter of fact, is unassailable. In reaching this conclusion, the State Board considered the cumulative effect of Cliffs' failure since 1982 to encourage its students to attend DMHS; the fact that if severance had been sought in 1982 when the real exodus began, it would have resulted in a 6.5% reduction in the white DMHS population; the succor which Cliffs received from the Tenafly tuition policy which "lured" and "enticed" a disproportionate number of high achieving white and Asian Cliffs students away from DMHS; the direct relationship of that policy to the accelerated decline in white enrollment at DMHS; the concentration of blacks and Hispanics at

DMHS which would exist in the wake of severance, a concentration "sharply out of balance" with the composition of the society in which the students would function; and the feelings of anger and inferiority which would be engendered in those who remained. In essence, the State Board considered the combination of long-term actual loss and symbolic loss as a substantial negative educational impact on the students at DMHS.

Cliffs contends that, taken together, these factors do not give rise to a substantial negative impact. This view first overlooks the mandate of *N.J.S.A.* 18A:38-13 that racial balance is an important consideration in evaluating the potential destabilizing effect of severance. Indeed, that language was engrafted onto the statute specifically to avoid withdrawals for discriminatory purposes which would have the effect of recreating segregated school systems with their inherent inequality of educational opportunity.

More to the point is the interrelationship between racial balance and education—a connection Cliffs persists in omitting from its reasoning. These are not isolated factors. They are different sides of the same coin. Our Supreme Court long ago recognized this principle in *Morean* and *Booker,* cases decided in the afterglow of *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 *S.Ct.* 686, 98 *L. Ed.* 873 (1954). A generation later, the promise of *Brown* remains only partially fulfilled and the optimism it engendered has been sorely tested. In these circumstances, the principle enunciated in *Morean* and *Booker is* more hallowed than ever: when children of all races learn to live with and respect each other in school at an early age, education is enhanced and the groundwork is laid for future participation of all in the "mainstream" of human affairs.

On this backdrop, Cliffs' suggestion that the only negative

impact of severance was insubstantial is plainly wrong. Indeed, the projected negative impact of severance on DMHS was so substantial that, even if we were to concede Cliffs' characterization of *N.J.S.A.* 18A:38-13 as a balancing statute, the puny positive impacts projected by Cliffs would clearly have been overwhelmed by the far-reaching and long-term negative impact on DMHS. The same reasoning applies to the State Board's denial of the creation of a dual sending-receiving relationship between Englewood, Cliffs, and Tenafly which would have had the same effect as severance.[7]

VI

We turn next to Cliffs' contention that the State Board's denial of severance violated its rights under Section 1 of the Fourteenth Amendment to the United States Constitution, which provides that:

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7. Cliffs also asserts that the State Board was wrong in applying the 1980 census figures without considering the potential pool of white students from Englewood who were not attending DMHS, their designated high school, but who were going to private schools. It urges that the State Board's decision fails to address the root cause of declining white enrollment at DMHS— Englewood whites' rejection of their own designated high school—and, in fact, punishes white Cliffs parents for the actions of their Englewood counterparts. Cliffs contends that when the total potential white student pool from Englewood is taken into consideration, the percentage decline in white enrollment due to a hypothetical Cliffs withdrawal in 1982 could have been no greater than 4.0%. The State Board did not consider those Englewood students who attended private schools because *N.J.SA.* 18A:38-13 only applies to public school students and the Commissioner's authority is solely applicable to public education and the public school system. *N.J.S.A.* 18A:4-21 to 40. Because Englewood parents, like all parents, are free to send their children to private schools, *Pierce v. Society of Sisters,* 268 U.S. 510, 534-36, 45 *S. Ct.* 571, 573-74, 69 L. Ed. 1070, 1077-78 (1925), the State Board properly confined its analysis to those students over which it had authority and control.

Appendix B

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [*U.S. Const.* amend XIV, § 1].

The Fourteenth Amendment proscribes discrimination on the basis of race and extends to all state action which distinguishes between its citizens solely in racial terms. *See e.g., City of Richmond v. J.A. Croson Co.*, 488 *U.S.* 469, 492-95, 109 *S.Ct.* 706, 720-21, 102 *L. Ed.* 2d 854, 880-82 (1989); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1445 (9th Cir. 1989), *cert. denied*, __*U.S.*__, 111 *S. Ct.* 248, 112 *L. Ed.* 2d 206 (1990). The parties here sharply disagree both as to the characterization of the State Board action and the level of judicial scrutiny to be applied under the Fourteenth Amendment. This is important because the nature of a legislative classification directs the standard of review. *State v. Bulu*, 234 *N.J. Super.* 331, 343, 560 *A.*2d 1250 (App. Div. 1989).

Regulation of a fundamental right or disparate treatment of a suspect class is subject to strict scrutiny, meaning that it must further a compelling state interest and there must be no less-restrictive means to accomplish that goal. *City of Cleburne v. Cleburne Living Center*, 473 *U.S.* 432, 440, 105 *S. Ct.* 3249, 3254, 87 *L. Ed.* 2d 313, 320 (1985); *Massachusetts Bd. of Retirement v. Murgia*, 427 *U.S.* 307, 311-13, 96 *S. Ct.* 2562, 2566-67, 49 *L.Ed.* 2d 520, 524-25 (1976); *San Antonio Independent School District v. Rodriguez*, 411 *U.S.* 1, 16-17, 93 *S. Ct.* 1278, 1287, 36 *L. Ed.* 2d 16, 33 (1973); *Brown v. City of Newark*, 113 *N.J.* 565, 573, 552 *A.*2d 125 (1989); *Barone v. Dep't of Human Services*, 107 *N.J.* 355, 365,

365, 526 *A.*2d 1055 (1987) (citing *Graham v. Richardson,* 403 *U.S.* 365, 91 *S. Ct.* 1848, 29 *L. Ed.* 2d 534 (1971)); *State v. Bulu, supra,* 234 *N.J.* Super. at 343-44, 560 *A.*2d 1250. Regulation which involves a semi-suspect class or which indirectly affects a fundamental right, is subject to an intermediate level of scrutiny, must further an important governmental interest and be substantially related to the achievement of that objective. *City of Cleburne v. Cleburne Living Center, supra,* 473 *U.S.* at 441, 105 *S. Ct.* at 3255, 87 *L. Ed.* 2d at 321; *Craig v. Boren,* 429 *U.S.* 190, 197, 97 *S. Ct.* 451, 457, 50 *L. Ed.* 2d 397, 407 (1976); *Greenberg v. Kimmelman,* 99 *N.J.* 552, 565, 494 *A.*2d 294 (1985); *State v. Bulu, supra,* 234 *N.J.* Super. at 344, 560 *A.*2d 1250. In all other cases, the rational basis test applies, requiring only that there be some rational connection between the state action and the legitimate state interest sought to be achieved. *See Massachusetts Bd. of Retirement v. Murgia, supra,* 427 *U.S.* at 312, 96 *S. Ct.* at 2566, 490 *L. Ed.* 2d at 524; *Drew Associates of New Jersey, LP v. Travisano,* 122 *N.J.* 249, 258-59, 584 *A.*2d 807 (1991); *Barone v. Dep't of Human Services, supra,* 107 *N.J.* at 364-65, 526 *A.*2d 1055 (citing *Dandridge v. Williams,* 397 *U.S.* 471, 90 *S. Ct.* 1153, 25 *L. Ed.* 2d 491 (1970)).

Cliffs naturally argues that strict scrutiny is required because it views the State Board's decision as "based upon the race of the Cliffs' student population and nothing else." According to Cliffs, what the State Board has done here is to "seize" children from across district lines on the basis of their race to avoid racial imbalance at DMHS. Such a characterization may apply to some case, but not the one before us. The sending-receiving side of this case is not a test of the right of the Commissioner and the State Board to force the exchange of students between districts which previously had no such policy among themselves. What is at issue here is a long-standing legal relationship between Cliffs and

Appendix B

Englewood pursuant to which the children of Cliffs have crossed school district borders voluntarily over the last quarter century. It is Cliffs which seeks to alter that status quo. In order to do so, it must meet the requirements of *N.J.S.A.* 18A:38-13, which apply to all school districts seeking to sever a sending-receiving relationship. The statutory standards are not *per se* under attack here. Thus it is hard to follow Cliffs' argument as to "seizure" of children across district lines or the creation of any classification, let alone a suspect racial one.

What is at issue here is an administrative adjudication based upon legislatively mandated considerations including the intertwined concepts of the quality of education and the racial composition of the schools in question. Is it race conscious as Cliffs contends? The answer is yes. Is race consciousness prohibited? The answer is no. It is only the *per se* use of race as a determinant which creates a classification subject to strict scrutiny under the Fourteenth Amendment. *Porcelli v Titus*, 431 *F.*2d 1254, 1257 (3d Cir. 1970), *cert. denied*, 402 *U.S.* 944, 91 *S. Ct.* 1612, 29 *L. Ed.* 2d 112 (1971). The United States Constitution does not prohibit states from taking race into account in educational decisions. *Wygant v. Jackson Bd. of Educ.*, 476 *U.S.* 267, 106 *S. Ct.* 1842, 90 *L. Ed.* 2d 260 (1986). Our Supreme Court so concluded in *Morean v. Bd. of Educ. of Montclair, supra*, which is controlling here, and which found "no substance to the petitioners' contention that since its plan of relocation had some racial motivation it was violative of the fourteenth amendment." 42 *N.J.* at 243, 200 *A.*2d 97. *See also Schults v. Bd. of Educ. of Teaneck*, 86 *N.J.* Super. 29, 40-41, 205 *A.*2d 762 (App. Div. 1964), *aff'd*, 45 *N.J.* 2, 210 *A.*2d 762 (1965).

Cliffs' reliance on *City of Richmond v. J.A. Croson Co., supra, Wygant, supra*, and *Regents of the University of California v.*

Bakke, 438 *U.S.* 265, 98 *S. Ct.* 2733, 57 *L. Ed.* 2d 750 (1978), a series of recent United States Supreme Court decisions which invalidated true racial classifications, is misplaced. In *Bakke, supra*, a white medical school applicant was denied the opportunity to compete for 16 seats of the entering class *solely* because of his race. 438 *U.S.* at 272-79, 98 *S. Ct.* at 2734-42, 57 *L. Ed.* 2d at 759-64. In *City of Richmond v. J.A. Croson Co., supra*, whites were denied the opportunity to compete for a fixed percentage of public contracts *solely* because of their race. 488 *U.S.* 478-82, 109 *S. Ct.* at 713-15, 102 *L. Ed.* 2d at 871-75. In *Wygant v. Jackson Bd. of Educ., supra*, there was a preferential layoff system in which minority teachers were retained over non-minority tenured teachers *solely* because of their race. 476 *U.S.* at 269-72, 106 *S.Ct.* at 1845, 90 *L.Ed.* 2d at 266-67. In an effort to analogize this case to the cited precedent, Cliffs argues that the "State Board attempted to reserve places for whites at DMHS in order to reduce minority representation." This is a distortion of what actually occurred. No amount of ingenuity can bring this case within the interdiction of *Bakke*, *Wygant* and *Croson* which involved absolute racial preferences in a zero-sum context. Indeed, a majority of Justices in *Bakke* specifically concluded that to achieve diversity, race is an appropriate consideration in school admission decisions. 438 *U.S.* at 318-20, 98 *S.Ct.* at 2762-63, 57 *L.Ed.*2d at 788-90 (Powell, J.); *Id.* at 324-25, 98 *S.Ct.* at 2765-66, 57 *L.Ed.*2d at 792-93 (Brennan, White, Marshall and Blackmun, JJ., concurring). In *Lige v. Town of Montclair*, 72 *N.J.* 5, 367 *A.*2d 833 (1976), our Supreme Court unambiguously explained the difference between a quota issue and the matter under review:

> It is important to recognize the difference between rectifying a racially improperly constituted school, *Jenkins v. Tp. of Morris School District and Bd. of Ed.*, 58 *N.J.* 483 [279

> *A.*2d 619] (1971), for no one has a right to attend a segregated school; whereas an applicant for a job or a promotion has a right to be considered and judged irrespective of race. [72 *N.J.* at 24, 367 *A.*2d 833].

If a classification exists here at all, which we doubt, it is not racial but geographic—all Cliffs' students are involved equally. The designated public high school for Cliffs' residents remains DMHS, and the injunction precludes other public school boards from accepting any Cliffs' student, regardless of race. Conversely, the injunction does not preclude other public school boards from accepting, for tuition, students who reside outside of Cliffs and Englewood. As such, the standard to be applied is a rational basis standard which requires only that there be some reasonable connection between a legitimate state interest and the action taken. *See Drew Associates, supra,* 122 *N.J.* at 258-59, 584 *A.*2d 807; *Barone v. Dep't of Human Services, supra,* 107 *N.J.* at 364-65, 526 *A.*2d 1055.

Even if we were to concede that the State Board's decision constitutes a race-based classification with respect to white Cliffs' students, that remedy would still pass constitutional muster. The State's compelling interest in diversity in the public schools *as a function of education* cannot be seriously questioned. *Jenkins, supra,* 58 *N.J.* at 498-99, 279 *A.*2d 619 (citing *Booker, supra,* 45 *N.J.* at 170-71, 212 *A.*2d 1). Concomitantly, the State's interest in "assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice" is beyond dispute. *City of Richmond v. J.A. Croson Co., supra,* 488 *U.S.* at 492, 109 *S.Ct.* at 720, 102 *L.Ed.*2d at 881 (comparing *Norwood v. Harrison,* 413 *U.S.* 455, 465, 93 *S. Ct.* 2804, 2810, 37 *L. Ed.* 2d 723, 731 (1973)). The only question then is whether the

decision is as narrowly tailored as it could be; was it the least restrictive means to accomplish the goal?

Cliffs contends that the State Board's action was overbroad because it ordered an inter-district remedy even though no inter-district violation had been found, contrary to *Milliken v. Bradley,* 418 *U.S.* 717, 94 *S. Ct.* 3112, 41 *L .Ed.* 2d 1069 (1974). This argument misapprehends *Milliken.* There the Supreme Court struck down a remedy imposed by the District court to relieve *de jure* school discrimination in Detroit. The District Court had ordered a consolidation of Detroit and 53 suburban school districts because it had determined that a Detroit-only remedy would not alleviate the effects of the segregation. *Id.* at 729-34, 94 *S. Ct* at 3119-22, 41 *L. Ed.* 2d at 1082-85. There was no evidence of any discrimination in the suburban districts. While Cliffs is correct when it contends that *Milliken* limits inter-district relief to inter-district violations, it errs in its attempt to apply that holding to this case. *Milliken* did nothing more than define the limits of a federal court's equity jurisdiction; the decision did not circumscribe in any way a state's authority to effectuate its own educational policies. Indeed, as the Supreme Court stated in *Hills v. Gautreaux,* 425 *U.S.* 284, 296, 96 *S. Ct.* 1538,1545, 47 *L. Ed.* 2d 792, 802-03 (1976):

> The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a *judicial decree* restructuring the operation of local governmental entities that were not implicated in any constitutional violation. [Emphasis added].

The same reasoning is applicable to Cliffs' reliance on the recent United States Supreme Court decision in *Freeman v. Pitts*, 503 *U.S.* __, 112 *S. Ct.* 1430, 118 *L. Ed.* 2d 108 (1992). Like *Milliken*, *Freeman* is a study of the limits of a federal court's continuing supervisory authority over a court-ordered plan to combat *de jure* segregation. *Freeman* addressed the margins of federal court authority where *de jure* segregation has undergone a period of transition to *de facto* segregation. *Freeman v. Pitts*, 503 *U.S.* at __, 112 *S. Ct.* at 1447, 118 *L. Ed.* 2d at 136 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 *U.S.* 1, 31-32, 91 *S. Ct.* 1267, 1283-84, 28 *L. Ed.* 2d 554, 575 (1971)). In the federal jurisdiction context, this is an important issue because federal courts are powerless to remedy *de facto* segregation. *See Freeman v. Pitts*, 503 *U.S.* at __, 112 *S. Ct.* at 1443-48, 118 *L. Ed.* 2d at 136-39; *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 *U.S.* __, __, 111 *S. Ct.* 630, 637-38, 112 *L. Ed.* 2d 715, 728-30 (1991); *Pasadena City Bd. of Educ. v. Spangler*, 427 *U.S.* 424, 436, 96 *S. Ct.* 2697, 2704, 49 *L. Ed.* 2d 599, 608 (1976). Nothing in *Milliken* or *Freeman* suggests that the limits there expressed are applicable to judgments of the highest state educational authority as to how to carry out longstanding state policies in favor of racial balance as a function of a thorough and efficient educational system. Whatever the Federal Constitution compels, it does not preclude such action by the State. *Jenkins, supra*, 58 *N.J.* at 498-99, 279 *A.*2d 619. Further, it is clear that the State Board here has applied the least intrusive remedy. It has not yet required consolidation of two unrelated districts; it has only enforced a long-standing voluntary, preexisting inter-district relationship.

Moreover, and notwithstanding that a particularized finding of intentional discrimination is not a prerequisite for state remedies for racial imbalance, *Jenkins, supra*, 58 *N.J.* at 506, 279 *A.*2d 619; *Booker, supra*, 45 *N.J.* at 170-78, 212 *A.*2d 1, such findings are the

leitmotif which runs throughout the decisions here. The Commissioner and the State Board clearly found that Cliffs' residents had engaged in white flight from DMHS, which flight was facilitated by the Tenafly Board's private tuition policy and by the Cliffs Board. As the Commissioner noted: "[n]o one could seriously believe that racial prejudice and circumvention of integration is not at play in this case." Likewise, the State Board concluded that to deny relief here would be to make the State a "passive participant" in private *discrimination*. No more specific findings are required. Under the circumstances, the State Board's action clearly passes strict scrutiny; it goes without saying that the lesser burdens are also met.

We turn next to Cliffs' New Jersey constitutional claim. Article I, paragraph 1 of the State Constitution protects against the unequal treatment of those who should be treated alike. *Barone v. Dep't of Human Services*, *supra*, 107 *N.J.* at 367, 526 *A.*2d 1055 (quoting *Greenberg v. Kimmelman*, *supra*, 99 *N.J.* at 568, 494 *A.*2d 294). When analyzing equal protection claims under the New Jersey Constitution, a balancing test similar to a Fourteenth Amendment analysis is applied. *Barone*, 107 *N.J.* at 368, 526 *A.*2d 1055. The weights in the balance are the nature of the affected right, the extend to which the government's restriction intrudes upon it and the public's need for the restriction. *Greenberg v. Kimmelman*, *supra*, 99 *N.J.* at 567, 494 *A.*2d 294; *State v. Bulu*, *supra*, 234 *N.J.* Super. at 344, 560 *A.*2d 1250. In describing the application of the analysis under the State Constitution, our Supreme Court has said that the focus is on "whether there is an appropriate governmental interest suitably furthered by the differential treatment" embodied in the action complained of. *Barone*, *supra*, 107 *N.J.* at 368, 526 *A.*2d 1055 (quoting *Borough of Collingswood v. Ringgold*, 66 *N.J.* 350, 370, 331 *A.*2d 262 (1975), *appeal dismissed*, 426 *U.S.* 901, 96 *S. Ct.* 2220, 48 *L. Ed.* 2d 826

(1976)). For the same reasons that we have rejected Cliffs' Fourteenth Amendment claim, we view its New Jersey constitutional analogue as insubstantial. As we have said, our State's education policy is advanced by the State Board's decision here which is a measured response to the problem presented.

It should not go unsaid that we agree with Englewood and the *amici* that Cliffs' invocation of the Fourteenth Amendment here turns that constitutional provision "on its head." The Fourteenth Amendment and its New Jersey counterpart are meant to shield our citizens against state sanctioned racial discrimination. To suggest that they prohibit a state from applying a statute, specifically addressed to remedying the educationally pernicious evils of white flight, racial imbalance, and *de facto* segregation in the schools is, at best, cynical.

VII

Cliffs complains that, even if the State Board properly denied its petition for severance, it exceeded its authority in enjoining Tenafly and other non-party school districts from accepting Cliffs students on a tuition basis. With respect to Tenafly, Cliffs claims that the State Board's injunction violated Tenafly's statutory right to exercise discretion as to which interdistrict students it accepts. It also argues that enjoining the THS tuition program will in no way increase the white student population at DMHS. Cliffs also asserts that the State Board's injunction denies due process to any school district not joined as a party.

The Commissioner has broad constitutional and legislative powers concerning public education. *N.J.S.A.* 18A:4-10; *Piscataway Tp. Bd. of Educ. v. Burke*, *supra*, 158 *N.J. Super.* at 441, 386 *A.*2d 439. These powers must be interpreted sufficiently

expansively to correspond with his "high responsibilities" in the education field. *Jenkins*, *supra*, 58 *N.J.* at 504, 279 *A.*2d 619. *N.J.S.A.* 18A:4-16 concomitantly confers on the State Board all necessary powers "requisite to the performance of its duties." Clearly, under appropriate circumstances, injunctive relief is a power available to the *State Board. Bd. of Educ. of Asbury Park v. Bds. of Educ. of Shore Regional High School District*, 1971 *S.L.D.* 221, *aff'd*, 1971 *S.L.D.* 228 (1971). Indeed, Cliffs concedes this theoretical power, arguing instead that the injunction was improvidently granted in this case because an injunction, the so-called "strong arm of equity," is an extraordinary remedy not justified by the facts. *Van Name v. Federal Deposit Ins. Corp.*, 130 *N.J. Eq.* 433, 442-43, 23 *A.*2d 261 (Ch. 1941), *aff'd*, 132 *N.J. Eq.* 302, 28 *A.*2d 210 (E. & A. 1942). We disagree.

Here, we have affirmed the State Board's determination that the Tenafly tutition policy had a serious negative impact on the racial balance at DMHS. As Tenafly's non-indigenous population increased, the situation at DMHS worsened. Tenafly not only "lured" and "enticed" Cliffs' students by its "beggar-thy-neighbor" policy, and in doing so syphoned off a disproportionate number of high achievers, but also attracted white and Asian Englewood students. Given those findings, the effectuation of the State's constitutional policy in favor of racial balance as a function of the quality of education not only authorized but compelled an injunction against Tenafly. *See In re Solid Waste Util. Customer Lists*, 106 *N.J.* 508, 516, 524 *A.*2d 386 (1987). As to the other school districts (none of which has complained), the State Board's directive was a necessary adjunct to the injunction against Tenafly. Without the directive, the State Board could not ensure total compliance with the educational goals it sought to achieve. Most importantly, the injunction was a critical element of the State Board's attempt to remedy the problem at DMHS by using the least

intrusive means. Given the history of this case, a *laissez faire* attitude, without an injunction, would have doomed these means to failure.

VIII

While a sending-receiving relationship is essentially an education services-for-tuition exchange made between two districts, that arrangement does not alter the structural integrity of either district. Regionalization, on the other hand, involves the formation of an entirely new school district governed by a separate board of education. *See Jenkins, supra,* 58 *N.J.* at 504-05, 508, 279 A.2d 619. Regional districts can be formed for all purposes or for limited purposes. *N.J.S.A.* 18A:13-2. Among the "limited purposes" is the organization of a regional district to operate a high school or high schools only. Englewood has petitioned for the creation of a regional high school district including it, Cliffs and Tenafly. The effect of such a regional district here would be to transfer control over DMHS and THS to a regional school board.

The authority for cross-district regionalization arises out of *Jenkins* where the Supreme Court expanded on the *Booker* principle of intra-district regionalization:

> It is true that *Booker* dealt with a community which was wholly contained within a single district fixed by municipal lines whereas here the community involves two districts.
>
> . . . .
>
> As the Supreme Court pointed out in *Reynolds v. Sims,* 377 *U.S.* 533, [575] 84 *S.Ct.* 1362, [1388] 12 *L.Ed.*2d 506,535 (1964), political subdivisions of the state whether they be

"counties, cities or whatever" are not "sovereign entities" and may readily be bridged when necessary to vindicate federal constitutional rights and policies. *See Gomillion v. Lightfoot,* 364 *U.S.* 339, 347, 81 *S.Ct.* 125, 5 *L.Ed.*2d 110, 116 (1960); *United States v. State of Texas,* 321 *F.Supp.* 1043, 1050-1058 (E.D. Texas 1970); *cf. Jackman, et al. v. Bodine, et al.,* 55 *N.J.* 371 [262 *A.*2d 389] (1970). It seems clear to us that, similarly, governmental subdivisions of the state may readily be bridged when necessary to vindicate state constitutional rights and policies. This does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere; but it does entail suitable measures of power in our State authorities for fulfillment of the educational and racial policies embodied in our State Constitution and in its implementing legislation. Surely if those policies and the views firmly expressed by this Court in *Booker* (45 *N.J.* 161 [212 *A.*2d 1]) and now reaffirmed are to be at all meaningful, the State Commissioner must have power to cross district lines to avoid "segregation in fact" (*Booker,* 45 *N.J.* at 168 [212 *A.*2d 1]), at least where, as here, there are no impracticalities and the concern is not with multiple communities but with a single community without visible or factually significant internal boundary separations. [*Jenkins,* 58 *N.J.* at 500-01, 279 *A.*2d 619].

Appendix B

The ALJ opined that the detriments of regionalization outweighed the benefits. The Commissioner adopted these findings and concluded that Englewood had failed to meet the three-part test established in *Jenkins* to prevail on the question of whether compulsory regionalization should be ordered: the existence of a "single community"; that regionalization is feasible and workable, and that it can be accomplished "without any practical upheavals." (citing *Jenkins, supra,* 58 *N.J.* at 505, 279 *A.*2d 619). The State Board rejected the Commissioner's legal conclusion (also previously expressed in *Bd. of Educ. of New Brunswick v. Bd. of Educ. of Tp. of North Brunswick and Bd. of Educ. of Milltown,* 1974 *S.L.D.* 962, 986 (1974), *aff'd,* 1975 *S.L.D.* 1110 (1975)) that *Jenkins* limited its authority to act to those circumstances where a "single community" exists and specifically concluded that it would not hesitate to order regionalization in a non-single community case where such a remedy was necessary to "vindicate our State's policy against segregation."

Cliffs and Tenafly argue that the single community principle is a part of the fundamental holding of *Jenkins* and that the State Board erred in dispensing with it. We disagree. A fair reading of *Jenkins* evidences no intention to restrict its remedial scope to such circumstances. The expansive general principle enunciated in *Jenkins* was that cross-district regionalization is an available arrow in the Commissioner's desegregation quiver. The Court took pains to explain the importance of this remedy in vindicating our State's constitutional and statutory policies. It described the municipalities under review (Morristown and Morris Township), as a single community because they were physically, socially, commercially, and governmentally interdependent. 58 *N.J.* at 485-86, 279 *A.*2d 619. Most importantly, the Court declared the configuration before it as "probably a unique one in our state." *Id.* at 485, 279 *A.*2d 619. It is inconceivable to us that the Court

intended its far reaching statement of policy to be limited to a fact pattern which, it recognized, was unlikely to reoccur. That is the interpretation urged by Cliffs and Tenafly. Its effect would be to eviscerate *Jenkins,* a result we will not allow.

We think the correct interpretation is that cross-district regionalization is available even where a single community does not exist. The facts in *Jenkins* were happenstance which made the ultimate outcome of that case obvious but did not constitute a requirement for the application of the fundamental case doctrine. In ruling to the contrary, the Commissioner essentially elevated the facts of the case into a principle of law. The State Board has now remedied the misreading, and we fully approve its interpretation.

In so doing, we specifically reject, as did the Supreme Court in *Jenkins,* the suggestion that principles of home rule and local control are violated by the exercise of the State Board's power in this context. 58 *N.J.* at 500, 279 *A.*2d 619. Like parental choice, home rule and local control must yield to the fulfillment of the educational and racial policies in the constitution and statutes of this State.

We also reject Tenafly's suggestion that the Legislature has implicitly overruled *Jenkins* by enacting statutory measures for the takeover of failing school districts. *See* Public School Education Act of 1975, *N.J.S.A.* 18A:7A-34 to -52. Having never been raised below, the argument is not properly before us and, in any event, is not meritorious. The State takeover legislation is a remedy for a failing school district and is essentially irrelevant to *Jenkins* and the facts presented here. *N.J.S.A.* 18A:7A-34.

Finally, we note that even if we were to accept the single community require as a part of the fundamental holding of *Jenkins,*

it would not bar a regionalization study in this case. Single community is nothing more than a reality principle, reflecting a pre-existing blurring of the municipal boundaries, rendering the bridging of those boundaries less impractical than would ordinarily be the case. 58 *N.J.* at 500, 279 *A.*2d 619. This record demonstrates long-term *de jure* and *de facto* educational interconnections between Englewood, Cliffs and Tenafly which we deem sufficient to meet the principles informing the single community doctrine.

Cliffs and Tenafly argue that, in any event, regionalization was properly rejected as a remedy because it is neither reasonable, feasible, workable nor educationally sound. In attempting to come to grips with these arguments, it is important to understand what is and what is not before us on the regionalization end of this appeal. As we read this record, although the Commissioner rejected regionalization because Englewood had failed to meet the *Jenkins* standards (single community, feasibility and no practical upheavals) the State Board made no such findings. It stated:

> While we concur that it is neither necessary nor advisable for this agency to actively pursue compulsory regionalization at this point, we do so for reasons different than those expressed by the Commissioner.

and:

> In that it has not been shown that more intrusive measures than those we have directed are necessary *at this juncture* in order to vindicate our State's constitutionally derived policy, we conclude that it would be *premature*

> for this agency to pursue compulsory regionalization *at this point.* [Emphasis added].

From these quotations, it can fairly be argued that the State Board not only rejected the Commissioner's conclusions as to the single community doctrine but also the balance of his conclusions as to Englewood's failure to meet the feasibility and no practical upheaval standards. Plainly there would be no warrant for the State Board to hold out the possibility of regionalization if it had already found regionalization to be an infeasible remedy which would cause undue practical upheavals. It is unnecessary, however, to go so far in interpreting the State Board's ruling. All that need to be said from our perspective is that the State Board never reached the substantive issues surrounding regionalization because it was convinced that the measure it put in place would "vindicate the State's constitutionally derived policy against segregation." Indeed, because of the way the case was decided by the ALJ and the Commissioner, no potential regionalization configurations were actually presented to the State Board for consideration. As such, the merits of regionalization are not before us.

IX

Englewood and the *amici* argue that the remedies originally ordered by the State Board (which did not include regionalization or a regionalization study) should be rejected by us because even if they were completely successful, they would still have left DMHS in a state of unconstitutional racial imbalance. The administrative hearing revealed the following facts relevant to this argument. As of 1987-1988, DMHS was 84.0% black and Hispanic. THS was 1.5% black and Hispanic. Blacks and Hispanics made up only 7.0% of the Cliffs school enrollment. The school population of

Appendix B

Bergen County, as a whole, was 6.4% black and 5.6% Hispanic. The most optimistic outcome under the orders issued by the State Board would have been that, within several years, all high school students from Cliffs would attend DMHS. The State Board concluded that under those circumstances, DMHS would remain 78.0% black and Hispanic while THS would remain overwhelmingly white. Put another way, if the State Board's initiatives were entirely successful, the minority enrollment of DMHS would remain more than six times that of the county as a whole and more than 35 times that of Tenafly. The State Board held that this result "might well afford all students who attend Dwight Morrow the educational advantages of a heterogeneous student population" since it would result in DMHS being "both multi-racial and multi-cultural."

Based on these facts, we have doubts about the State Board's original denial of a regionalization study. In *Booker,* the Supreme Court said that "children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better." 45 *N.J.* at 170, 212 *A.*2d 1. It also declared that the Commissioner has a duty to ensure that such learning occurs in schools that are not *de facto* segregated and that he must not only eliminate schools that are "entirely or almost entirely Negro," 45 *N.J.* at 178, 212 *A.*2d 1, but must also achieve "the greatest dispersal consistent with sound educational values and procedures." *Id.* at 180, 212 *A.*2d 1. By focusing on *Booker's* "multi-racial and multi-cultural" reference instead of the principle of "greatest dispersal", it seems to us that the State Board recast the expansive holding of *Booker* as the far more limited holding that achieving some minimal racial and cultural diversity will suffice. In so doing, the State Board eviscerated *Booker's* explicit ban on school segregation. If it had taken no further action, we would likely have intervened on this issue, at least to the extent of

requiring an explanation of what educational values and procedures the State Board viewed as counter-balancing the need for greatest dispersal. Because of the later developments, it is unnecessary for us to do so.

X

On June 5, 1991, during the pendency of this appeal, the Commissioner issued his first annual report to the State Board pursuant to the State Board's earlier order. In his report the Commissioner (1) described the efforts which Cliffs and Englewood had made to develop a plan encouraging students to attend their designated high school, (2) set forth his suggestions as to how to improve those plans, and (3) recommended that a regionalization study be begun because he doubted that the State Board's remedial measures would reverse the trend of white migration from the designated high school. On July 3, 1991, the State Board enacted a resolution adopting the Commissioner's recommendations.

On August 5, 1991, Cliffs and Tenafly filed motions pursuant to *R.*2:2-4 for leave to appeal from the State Board's July 3 resolution. Their principal claim is that the State Board violated *R.*2:9-1 in ordering a regionalization study while this appeal was pending. They also reprise many of the arguments we addressed earlier in urging that the decision to order the study was arbitrary because the State Board has no power to regionalize in these circumstances; that the precedent in this case is violated by the order; that the study violates federal constitutional principles, and that it contravenes the Governor's position on the subject. Englewood counters that the order merely implemented the unstayed April 1990 ruling of the board. We agree with this view. But even if it could be argued that the July 3 ruling had sufficient

commonality with the issues on appeal to have warranted a motion by the State Board for a temporary remand to take further action, that motion, if made, would surely have been granted. We thus address the State Board's decision on its merits.

We have previously rejected the argument that the State Board lacks the theoretical power to regionalize unrelated districts and to take race into consideration when doing so. Likewise, we find no merit to Cliffs' claim that the Governor's recent general statement about regionalization has any effect whatsoever on the State Board's authority to fashion an appropriate remedy in a specific case. Further, the suggestion that the regionalization study order violates precedent in this case overlooks the fact that the study was clearly within the intendment of the April 5, 1990 order which authorized the Commissioner to recommend additional measures if he determined that the monitoring process was not yielding results with sufficient alacrity. That is exactly what occurred.

We likewise reject the argument that the order for a study is invalid because there are no "standards" to govern the conduct of such a study. *Jenkins* gives us those standards: any plan for regionalization must be "reasonable, feasible and workable." Clearly, the State Board is the proper arbiter of when regionalization is appropriate:

> It is axiomatic that the Legislature may commit a subject to the judgment of an administrative agency with a statement of the goal to be reached rather than the path to be followed to reach it. The exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards. [*In re Trenton Bd. of Ed.*, 176 *N.J.*

Appendix B

> *Super.* 553, 562 [424 *A.*2d 435] (App.Div.1980), *aff'd,* 86 *N.J.* 327 [431 *A.*2d 808] (1981) (citations omitted)].

Indeed but for the politically and emotionally charged subject matter here, it is hard for us to imagine any reasonable person challenging the power of the Board to "study" an issue committed to its overall authority.

Englewood and the *amici* oppose further study of this issue on wholly different grounds. They urge that the six years this case has been pending is long enough to wait for a remedy. We agree but the necessity of further study is evident and no action by us is feasible in the absence of a ruling by the State Board in the first instance. As the State Board argued before us, "[u]ntil a full study has been completed the appropriateness of regionalization cannot be determined." *Branchburg, supra,* 173 *N.J.Super.* at 276, 414 *A.*2d 259. Further, as we understand it, Englewood, Cliffs and Tenafly are not the only districts which will be the focus of the study. If an ultimate regionalization plan is approved, these objectors may not even be a part of it.

Naturally, every effort should be made to complete the study quickly because the amount of time which has elapsed since the inception of this case has been inordinately long. The stay of the State Board's resolution authorizing a regionalization study is thus dissolved. There is simply no reason to delay the study further even if the appeal is pursued. We are, however, in no position to assess, at this point, the extent of the study necessary (other than to observe that Englewood and Tenafly have already been exhaustively reviewed) or to place specific time limits on the completion of this difficult task. If it appears that a further unreasonable delay is occurring during the study, any party may return to us to apply for a more definitive time table.

Appendix B

We affirm the denial of termination of the sending-receiving relationship between Cliffs and Englewood. We affirm the denial of the establishment of a dual sending-receiving relationship between Englewood, Cliffs and Tenafly. We affirm the injunction against all public school boards in the state accepting students from Cliffs or Englewood. We affirm the order denying regionalization at the present time, and we affirm the order for a regionalization study.

APPENDIX C — DECISION AND ORDER OF THE NEW JERSEY STATE BOARD OF EDUCATION, DATED APRIL 4, 1990 AND APRIL 5, 1990

EDU #1086-86
C # 193-88
SB # 37-88

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

PETITIONER/CROSS RESPONDENT-APPELLANT,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

RESPONDENT/CROSS PETITIONER-CROSS APPELLANT,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

CROSS RESPONDENT-APPELLANT,

and

A.S., by her guardian *ad litem*, R.S.,

INTERVENOR.

Appendix C

Decided by the Commissioner of Education, July 11, 1988

Decision on motion by the Commissioner of Education, September 1, 1988

Decision on motion by the State Board of Education, November 1, 1988

Decision on motion by the State Board of Education, December 1, 1988

Decision on motion by the Commissioner of Education, February 22, 1989

Decision on motion by the State Board of Education, May 3, 1989

Decision on motion by the Commissioner of Education, September 6, 1989

Decision on motion by the State Board of Education, March 7, 1990

For the Petitioner/Cross Respondent-Appellant, Hellring, Lindeman, Goldstein, Siegal, Stern & Greenberg (Joel D. Siegal, Esq., of Counsel)

For the Respondent/Cross Petitioner-Cross Appellant, Clapp and Eisenberg (Arnold K. Mytelka, Esq., and Agnes I. Rymer, Esq., of Counsel) and Paul L. Tractenberg, Esq.

For the Cross Respondent-Appellant, Riker, Danzig, Hyland, and Perretti (James J. Rothschild, Esq. and Glenn D. Curving, Esq., of Counsel)

Appendix C

For the Intervenor, Smith, Don, Alampi & Scalo (Philip Scalo, Esq., of Counsel)

I

This case was initiated by the Board of Education of the Borough of Englewood Cliffs (hereinafter "Cliffs Board"), which, pursuant to *N.J.S.A.* 18A:38-13, petitioned the Commissioner on December 23, 1985, seeking permission to terminate its sending-receiving relationship with the Board of Education of the City of Englewood (hereinafter "Englewood Board") and to enter into a new sending-receiving relationship with the Board of Education of the Borough of Tenafly (hereinafter "Tenafly Board").[1] In its petition, the Cliffs Board asserted that deficiencies in the management of Dwight Morrow High School (DMHS), the receiving school, and the quality of the educational environment provided to its students at that school had led it to conclude that continuation of its relationship with the Englewood Board was contrary to the interests of its students. It further asserted that because of community dissatisfaction resulting from the many educational problems at Dwight Morrow High School, the great majority of its high school students were paying tuition to attend Tenafly High School (THS) or a private or parochial school, and

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1. We note that in amending *N.J.S.A.* 18A:38-13, the Legislature eliminated the requirement that the termination of a sending-receiving relationship could be granted only upon a showing of "good and sufficient reason." The Legislature, however, further altered the statute so as to *require* the Commissioner to grant termination if he finds, after consideration of all circumstances, including the effect of severance on the racial composition of the pupil populations of the districts, that "no substantial negative impact will result therefrom." We further note that although this action was filed prior to the November 24, 1986 effective date of the amendment to the statute, hearings began subsequent to that date, and the parties were agreeable to litigating under the amended statute.

that termination of its relationship with the Englewood Board would not have a significant effect on the racial balance of any of the districts involved.

In its answer, the Englewood Board alleged that termination of the relationship would violate the New Jersey State Constitution, as well as State statutes and public policy. It also cross-petitioned the Commissioner, requesting that he permanently enjoin and restrain the Tenafly Board from accepting for enrollment at Tenafly High School students from the City of Englewood and Englewood Cliffs. In this respect, the Englewood Board asserted that in accepting these students on a tuition basis, the Tenafly Board had disregarded the sending-receiving relationship between the Cliffs Board and the Englewood Board, and that the Tenafly Board's practice of accepting students from these two districts had and would continue to have an adverse impact on the racial composition of Dwight Morrow High School, increasing the probability that the school would become totally segregated.

The Englewood Board further sought the creation of a regional school district to be comprised of Englewood, Englewood Cliffs and Tenafly, urging that the creation of such a district was necessary to vindicate constitutional rights and State policies regarding the achievement of racial balance. It asserted that this remedy was appropriate in that 1) the communities were adjoining, 2) despite the sending-receiving relationship between the Englewood and Cliffs Boards, Englewood Cliffs students were attending Tenafly High School on a tuition basis, 3) the large majority of Englewood Cliffs and Tenafly students were white while the majority of Englewood students were members of minority groups, and 4) all three districts had experienced declining enrollment of high school age students, adversely

affecting their ability to provide educational programs and opportunities.

In response to the Englewood Board's cross-petition, the Tenafly Board admitted that some Englewood Cliffs students were attending Tenafly High School. While not denying that acceptance of these students had adversely affected the racial composition of Dwight Morrow High School, the Tenafly Board asserted that the Englewood Board's cross-petition failed to state a claim upon which relief could be granted, and that, in accepting tuition students, the Tenafly Board had in all respects complied with *N.J.S.A.* 18A:38-3. It further alleged that the Englewood Board had initiated the action for regionalization solely because of the Cliffs Board's intention to withdraw from its relationship with the Englewood Board, and sought dismissal of this action on the grounds that it had been brought in bad faith for the sole purpose of delaying withdrawal and intimidating the parties.

The matter was transmitted in its entirety to the Office of Administrative Law (OAL) for hearing. Those hearings were conducted over a period of 99 days, prior to which the parties engaged in extensive discovery. The record generated by the hearings is massive, including over 600 exhibits and nearly 20,000 pages of transcripts. It was on this record that the Administrative Law Judge (ALJ) entered his findings and recommendations with respect to the central issues presented by the parties.

In his initial decision, the ALJ recommended that both the Cliffs Board's petition for termination of its sending-receiving relationship with Englewood and its alternative request for establishment of a dual sending-receiving relationship with Englewood and Tenafly be denied and that the Tenafly Board be directed to cease admitting students who were residents of

Englewood Cliffs and Englewood to Tenafly High School except for those enrolled in the Tenafly school system as of the date of the initial decision. He also recommended denial of Englewood's cross-petition for the establishment of a regional high school district. These recommendations were based on his findings and analysis as set forth in his initial decision.

In evaluating the Cliffs Board's petition to terminate its sending-receiving relationship with Englewood, the ALJ found that while the Cliffs Board was acting in good faith for what it perceived to be the best educational interests of its students, DMHS was in fact providing a good solid education which more than adequately prepared students attending that school for college and later life. While his findings in this regard were not limited to Englewood's certification status, the ALJ noted that DMHS had passed Level I monitoring and, therefore, was fully certified as satisfying State standards for the provision of a thorough and efficient education.

In arriving at his conclusions regarding the quality of education provided by the districts involved in this case, the ALJ found that: 1) both DMHS and Tenafly High School offered well-rounded college preparatory programs, but DMHS had a much greater emphasis on improving basic skills, maintaining discipline and increasing attendance, areas taken more for granted at THS; 2) the record failed to provide support for the fear expressed by Englewood Cliffs parents that their children would be at risk of physical harm at DMHS; 3) while teachers at THS had a slight edge over their counterparts at DMHS both in years of experience and attainment of advanced degrees, the teaching staff at THS was sorely deficient in the area of racial composition — with the exception of one Hispanic and one Asian teacher, its staff was all white in 1986-87, while DMHS's teaching staff was 61% white,

32% black and 6% Hispanic or Asian; 4) both schools provided a wide range of courses for students of different ability levels and interests, including advanced placement, honors and enrichment courses, but class sizes tended to be smaller at DMHS; 5) both districts had experienced problems with administrative turnover and teacher morale; 6) both schools offered a wide array of co-curricular activities, but the degree of participation by Englewood Cliffs students in such activities at DMHS exceeded that of Englewood Cliffs students at THS; 7) DMHS sat on a beautifully landscaped and wooded campus, but was older, drabber and more in need of repairs than THS; 8) DMHS students, in the aggregate, scored consistently lower than students at THS and other Bergen County high schools on standardized tests, but DMHS's scores on the HSPT had improved substantially in 1986-87 and college-bound students did very well at DMHS; 9) the ability of Englewood Cliffs students to pursue higher education did not appear to have been hampered in any way by attendance at DMHS; 10) DMHS had a broader and more comprehensive curriculum than THS, particularly for students interested in vocational careers or requiring special education services. The ALJ further noted that the Englewood Board had mounted an effective campaign to deal with its recurring past problems.

The ALJ then turned, as required by *N.J.S.A.* 18A:38-13, to analysis of whether termination of the relationship between Englewood Cliffs and Englewood would result in substantial negative impact on the racial composition, educational quality, financial condition or facilities at DMHS. Although concluding that termination would have no substantial financial impact nor any substantial impact with respect to facilities, the ALJ found that termination would have a significant impact on the racial balance at Dwight Morrow and would have a substantial impact on the quality of education at that school.

Appendix C

In assessing the impact of termination on the racial composition of the pupil population attending Dwight Morrow, the ALJ concluded that because the school was so precariously short of white and Asian students, the loss of even a small number of Englewood Cliffs students would have a significant impact on racial balance at the school, noting that the loss of the 15 white Englewood Cliffs students would a make a difference of 1.6% in the overall proportion of white students at DMHS, and these 15 white students constituted 16% of the 94 white students enrolled at the school.

Regarding the future impact of severance, the ALJ relied upon the testimony of Dr. Mario Tomei, who was qualified as an expert in the field of impact on racial and ethnic student composition, and who, testifying for the Cliffs Board, provided a conservative estimate of future losses.

Using the cohort survival ratio procedure with three years of data,[2] Dr. Tomei projected that without severance, there would be 21 Englewood Cliffs students attending DMHS in 1990-91, of which 15 would be white, out of a total student body of 662 in a 9-12 school and 808 in an 8-12 school.[3] In a 9-12 school, Dr. Tomei expected a total of 58 whites in 1990-91 without severance, representing 8.76% of the student population, and 43 whites with severance, representing 6.71%. This would constitute a 2.1% drop in the white population at the school with severance, the Englewood Cliffs students comprising 28% of the white student

2. The cohort survival ratio procedure is a methodology based upon the proportion of students attending one grade who were enrolled in the same school in the previous grade.

3. We note that there were plans for Englewood to use part of the facilities at DMHS for its resident eighth grade students.

body. In an 8-12 school, Dr. Tomei projected a total of 61 whites without severance, representing 7.55% of the student body, and 46 whites with severance, representing 5.84%. This would constitute a 1.7% drop in the white population at the school with severance, the Englewood Cliffs students comprising 25% of the white student body. He did not project a secondary loss of Englewood students in the event that severance was granted.

The ALJ concluded that even accepting the projections of Dr. Tomei, which were more conservative than the projections of the Englewood Board's experts, the impact on racial composition must be regarded as substantial in a school with such a low white and Asian population. While noting that some amount of secondary loss of Englewood students would occur if severance were granted, the ALJ concluded that the record did not provide a credible basis for quantifying that amount.

In evaluating the impact of termination on the quality of education, the ALJ recognized that both Englewood and Tenafly had been experiencing declining student enrollment at the high school level. While finding that the departure of the 21 Englewood Cliffs students then attending DMHS, in and of itself, would not seriously impair the educational program at DMHS, the ALJ found that severance would result in a "symbolic loss," representing a substantial negative impact on the quality of education at Dwight Morrow.

In this respect, the ALJ relied upon a "report" by Dr. Michelle Fine, a social psychologist engaged by the Englewood Board, which he found substantiated the "symbolic loss" that DMHS would suffer if severance were approved. On this basis, the ALJ concluded that those students left behind at the school would perceive the result as an implicit message that DMHS was acceptable for blacks and Hispanics, but not good enough for

whites and Asians. Feelings of isolation and inferiority engendered by such perceptions, the ALJ noted, would lower the self-confidence of minority youngsters and be detrimental to their trust in the basic fairness of the educational system. The ALJ further found that the Englewood Cliffs contingent at DMHS represented a proportionally large number of upper income and high-achieving students who helped to motivate and set an example for the economically deprived and low-achieving students at the school. Loss of these particular students, he concluded, would have a much greater negative impact on educational quality than their numbers alone would suggest.

The ALJ then turned to assessment of Tenafly's tuition policy. Relying on a report by Dr. Robert D. Fleischer showing that of 234 school districts, 85% had no tuition students in 1985-86 while THS had 74 enrolled, more than three times as many as the next highest, and on an informal survey of 20 Bergen County districts by the Tenafly Board, the ALJ found that the Tenafly Board had a novel tuition policy enacted to alleviate the adverse effects of its own declining enrollment. He found that, as applied, the policy had many characteristics of a private school placement, and while not racially exclusive on its face, whites and Asians, as a group, were better able to afford the entry fee. He further found that, in practice, the policy had attracted disproportionately high numbers of students from Englewood Cliffs and Englewood. The practical effect of the policy had been to drain upper income whites and Asian college bound students from DMHS, subverting that school's efforts to promote racial balance and luring many of its academically talented students.

In arriving at this finding, the ALJ found it immaterial how many tuition students from Englewood Cliffs might decide to go to private or parochial schools were the Tenafly option foreclosed,

emphasizing that THS is not a private school and that while State officials do not have the authority to prevent an individual from attending a non-public school, they do have the constitutional and statutory responsibility for supervising the public education system. Concluding that fact-finding should deliberately avoid any inquiry into what choices parents might conceivably exercise if the State's policy with respect to segregation is enforced, the ALJ found that the key fact here was the number of Englewood Cliffs and Englewood students enrolled at Tenafly High School who by all rights belonged at DMHS if they chose to attend public school. The ALJ concluded that by the enrollment of 76 Englewood Cliffs students and 16 Englewood students, Tenafly's tuition policy seriously undermined the continuing ability of Englewood to provide equal educational opportunity to all its students.

The ALJ then assessed Englewood's petition for regionalization, recognizing that Englewood had not mapped out in exact detail any plan for regionalization, but rather had provided potential configurations in the event that the Commissioner ordered further study of regionalization. Finding that Tenafly, Englewood and Englewood Cliffs were autonomous and distinct communities, the ALJ found that the disadvantages of forced regionalization outweighed the advantages. The primary disadvantages, aside from turmoil, specified by the ALJ included diverting the energies of administrators and teachers from educating children and diverting money from improving educational opportunities in the existing districts. The ALJ also found that the Englewood Board had not put on a convincing case that regionalization was the best solution in this instance given that desegregation literature cautions that forced merger carries the greatest risk of white flight.

Applying the law to his findings, the ALJ found that the losses

shown with respect to demoralization and student perception were demonstrable, detectable, verifiable, and definite and tangible. Thus, he determined that, without more, these losses justified denial of the Cliffs Board's petition for termination. He concluded that an examination of all the equitable circumstances must include a thorough examination of Tenafly's tuition policy and its detrimental impact on DMHS. He further concluded that such inquiry must be premised on the State's policy against discrimination and segregation in the public schools, as articulated in *Booker et al. v. Board of Education of the City of Plainfield,* 45 *N.J.* 161 (1965) (hereinafter "Booker") and *Jenkins et al. v. Tp. of Morris School Dist. and Bd. of Ed.,* 58 *N.J.* 483 (1971) (hereinafter "Jenkins"). The ALJ found that Tenafly's intentions did not negate the State's involvement in the violation of a constitutional duty and, observing that Tenafly was hardly in the position of an innocent bystander, concluded that Tenafly's policy was not only repugnant, but was plainly against the law.

In arriving at this conclusion, the ALJ relied on *Asbury Park Bd. of Educ. v. Shore Reg High School Dist. Bd. of Educ.,* 1971 *S.L.D.* 221, *aff'd* by the State Board, 1971 *S.L.D.* 228 (hereinafter *"Shore Regional"*), which involved a tuition policy similar to the one involved in the matter before him. He rejected Tenafly's argument that the Commissioner lacked the legal authority to prohibit a district board from setting its own admission conditions for nonresident students because *N.J.S.A.* 18A:38-3 affords district boards the discretion to accept nonresident students. Rather, he found that the Commissioner and State Board had the power and the duty to take decisive action when, as in the case before him, local board action clearly conflicts with overriding State policy and threatens to cause substantial harm to another district.

Cautioning that State officials should resist the temptation to

count heads of those Englewood Cliffs students who would not return to DMHS if the Tenafly option were foreclosed in that such figures were irrelevant to the legal issues in the case, the ALJ concluded that restatement of the ruling in *Shore Regional* should be sufficient to deter other public school districts from breaking the law.

The ALJ found that application of *Jenkins* so as to direct regionalization in this case would require extension of *Jenkins* since the communities involved here were not a single community as they were in *Jenkins*. He, however, concluded that this case did not appear to be an appropriate factual setting in which to so act, given his finding that the potential risks of regionalization were greater than the potential benefits.

Finally, the ALJ rejected the establishment of a dual sending-receiving relationship as a way of maximizing parental choice, emphasizing that while "freedom of choice" was then under study by State education officials, in this instance such relief would afford choice only to the parents of Englewood Cliffs children.

The Commissioner fully agreed with the ALJ's recommendation to deny severance of the sending-receiving relationship between Englewood and Englewood Cliffs. In adopting this recommendation, the Commissioner rejected the argument that the State's policy against racial segregation was not implicated in this matter and, stressing that it was his responsibility to combat "flight" from a racially imbalanced school, further emphasized that New Jersey's strong policy against "segregation/imbalance" extended to *de facto* segregation.

The Commissioner found it obvious in this case that DMHS had a "serious racial imbalance problem" in that barely 12% of its

student population was white in 1987-88. He concluded that any district board action jeopardizing such a "precarious" racial balance must be scrupulously examined.

In this framework, the Commissioner concurred with the ALJ's finding that severance of the sending-receiving relationship between Englewood and Englewood Cliffs would have a significant negative impact on racial balance in that, notwithstanding the small number of students involved, the percentage loss of white students would be 16% in 1989-90 and 25% in 1990-91. In this respect, the Commissioner distinguished *Morris School District v. Harding,* 1974 *S.L.D.* 457, *aff'd* by the State Board, 1974 S.L.D. 487, *aff'd,* Docket #A-905-74 (App. Div. 1975), where a 1% increase in black enrollment to 16% was expected to occur as a result of severance, emphasizing that "minority" enrollment in this case was already 88% and, in further contrast to *Morris,* there was no anticipated growth in the number of white students.

Adopting the ALJ's findings with respect to enrollment projections, the Commissioner was "compelled to put to rest once and for all the belief that because painfully few white students remain in a school because of a pattern of withdrawal there can be no significant impact on racial composition." Commissioner's decision, at 103. Thus, the Commissioner determined to consider not only the few remaining students from a sending district who were attending public school in the designated receiving district, "but the pool of eligible students as well who have withdrawn for whatever reason be it to private school, parochial school or, in this particular case, to a public high school in another community as well." *Id.*

Finding that the dramatic decline in this case in the enrollment

of Englewood Cliffs students was attributable to "white flight," the Commissioner concluded that to grant severance "as a matter of public policy would place an imprimatur of acceptance by the State to this flight." Commissioner's decision, at 104.

In assessing the impact of severance on educational quality, the Commissioner found it unnecessary to look beyond *Brown v. Board of Education of Topeka,* 374 *U.S.* 483, 74 *S. Ct.* 686, 94 *L. Ed.* 873 (1954) (hereinafter "Brown"), in order to support the ALJ's reliance on evidence dealing with "symbolic loss," *i.e.,* the psychosocial dimension of education. Relying on *Booker,* which established that the educational effects of *de facto* segregation were negative, the Commissioner fully supported the ALJ's conclusion that severance would have a significant negative impact on the quality of education at DMHS.

In this respect, the Commissioner found Dr. Fine's "study" supportive of negative symbolic loss. However, while recognizing that the impact of a student's feelings does not necessarily lead to the conclusion that he or she would leave, and while finding that some secondary loss would undoubtedly result, the Commissioner agreed with the ALJ that such "secondary loss" could not be quantified and was too speculative for purposes of this inquiry. Thus, the Commissioner adopted verbatim the ALJ's conclusions that severance would have a substantial negative impact on the quality of education.

Turning to the question of the propriety of Tenafly's tuition policy the Commissioner found that, although the policy itself was not against the law, the effect of the policy on the racial balance at DMHS was contrary to public policy. He concluded that while the Tenafly Board's policy was not discriminatory on its face, and while it had not been adopted for improper motives, the policy was

repugnant in that it exacerbated racial imbalance by skimming off and luring students eligible to attend DMHS.

Observing that 92 students were involved here, in contrast to *Shore Regional* which involved 8 students, the Commissioner further concluded, as had the ALJ, that the principles of that case were directly applicable in judging the propriety of Tenafly's tuition policy.

Thus, relying on the decisions of the Commissioner and State Board of Education in *Shore Regional,* and finding that the right of a district board to enact a tuition policy under *N.J.S.A.* 18A:38-3 or of parents to send their children to school under such a policy was in no way diminished, the Commissioner emphasized that where there is a conflict between rights under *N.J.S.A.* 18A:38-3 and the constitutionally- and statutorily-based policies on racial integration, it is the Commissioner's obligation to combat racial imbalance. The Commissioner therefore found that any rights of the Tenafly Board or of Englewood Cliffs and Englewood parents under *N.J.S.A.* 18A:38-3 must be subordinate to the compelling State interest to combat racial imbalance.

The Commissioner therefore adopted the findings and conclusions of the ALJ with the modification that any student from Englewood Cliffs or Englewood enrolled in and attending eighth grade in Tenafly on April 18, 1988, the date of the initial decision, would be permitted to attend THS in September 1988, through graduation.

Like the ALJ, the Commissioner rejected the alternative of establishing a dual sending-receiving relationship, finding that to grant such relief would serve to legitimize the flight of 76 Cliffs students to THS, which had contributed to the serious racial

imbalance at DMHS. In this respect, the Commissioner emphasized that even if legitimate educational reasons are advanced for either severing an existing sending-receiving relationship or establishing a dual relationship, neither form of relief would be granted where, as he had found in this case, substantial negative impact on racial composition and educational quality outweighed the educational benefits sought.

Finally, the Commissioner concluded that a compulsory regionalization study should not be ordered. While adopting the ALJ's factual and legal findings in this respect, the Commissioner concluded that under *Jenkins,* forced regionalization will be ordered *only* when the factual circumstances demonstrate that: 1) a "single community" exists between or among the districts in question, 2) regionalization is "entirely reasonable, feasible, and workable," and 3) regionalization can be accomplished "without any practical upheavals." Finding that Englewood had failed in these proofs, and concluding that responsibility for any "incompleteness" in the record rested solely with Englewood, the Commissioner dismissed Englewood's motion for regionalization and found that there was no compelling basis for ordering a regionalization study.

In sum, like the ALJ and on the basis of his findings that significant negative impact on racial composition and educational quality would result from severance, the Commissioner denied the Cliffs Board's petition to terminate its sending-receiving relationship with Englewood, as well as its request to establish a dual sending-receiving relationship with Tenafly. He ordered that the Tenafly Board cease and desist from admitting to its high school on a tuition or other basis any students who were residents of either Englewood or Englewood Cliffs except for those enrolled in and attending THS or eighth grade in the Tenafly School District

as of April 18, 1988, the date of the initial decision. Finally, he denied the Englewood Board's cross-petition for regionalization for failure to demonstrate circumstances comparable to those in *Jenkins*.

II

The Cliffs Board appealed to the State Board from the Commissioner's determination denying its petition to terminate its sending-receiving relationship with the Englewood Board and enjoining Englewood Cliffs students from attending THS. The Tenafly Board filed an appeal from the Commissioner's decision enjoining it from accepting to THS any students who were residents of Englewood or Englewood Cliffs, and the Englewood Board filed a cross-appeal from the Commissioner's decision denying its cross-petition for forced regionalization. Thus, all three of the Commissioner's central determinations have been challenged by these appeals.

In support of its appeal, the Cliffs Board argues that the Commissioner, in applying *N.J.S.A.* 18A:38-13, equated *any* racial impact with *substantial* impact, asserting that the impact of severance on the racial composition of DMHS would be *de minimis* in light of the number of Englewood Cliffs students attending DMHS, and that even the attendance at DMHS by every Englewood Cliffs high school student would not solve the problem of deterioration in the racial balance at that school. The Cliffs Board further maintains that the "symbolic losses" found by the Commissioner were based on speculation in the absence of the sort of data traditionally considered to be "definite and tangible," and that the Commissioner failed to weigh his finding of substantial negative impact against the benefits of severance to the sending district and its pupils, alleging that the record establishes that the parents' preference for THS is grounded in hard educational facts.

Appendix C

The Cliffs Board also argues that the Commissioner's order enjoining Tenafly from accepting into THS students from Englewood and Englewood Cliffs was improper, asserting that the only rationale for this decision was the effect he perceived Tenafly's tuition policy to have on the racial balance at DMHS, and that there was no basis in federal or State law for such an injunction. It maintains that consideration of the constitutional rights of Englewood Cliffs parents to educate their children as they desire mandates reversal.

The Englewood Board asserts that the Commissioner correctly denied severance of the sending-receiving relationship, contending that in the context of a school with only about 12% white students and 4% Asian students, the loss of 16% of the school's white population would have been "substantial and devastating," and urges affirmance of the Commissioner's decision prohibiting Englewood and Englewood Cliffs students from attending THS. It also urges us to reverse the Commissioner's decision to deny regionalization of the districts.

In support of its cross-appeal seeking regionalization, the Englewood Board argues that regionalization is feasible, would achieve racial balance, that, while these communities are not a "single community" as the Court found in *Jenkins,* there are significant ties among them, and that the Court in *Jenkins* did not confine regionalization to the unique facts of the Morristown/ Morris Township relationship.

The Tenafly Board, in support if its appeal, argues that the Commissioner was without authority to prohibit it from accepting students from Englewood and Englewood Cliffs, contending that *N.J.S.A.* 18A:38-3 gives it the right to accept nonresident tuition students. It maintains that neither the statute, the Commissioner's

authority to supervise the public schools nor public policy provided the Commissioner with the authority to ignore the express grant of authority given to local boards by *N.J.S.A.* 18A:38-3 absent an improper or illegal purpose. The Tenafly Board further contends that the Commissioner's reliance upon *Booker* and *Jenkins* is misplaced, arguing that neither decision gives the Commissioner the authority to prohibit the lawful exercise of a statutory right by an innocent third party merely because that action may have an adverse impact on a neighboring district.

On November 1, 1988, we granted the motion of A.S. (hereinafter "Intervenor"), a student from Englewood Cliffs attending seventh grade in the Tenafly district on April 18, 1988, the date of the ALJ's decision, to intervene in these proceedings. Such intervention was limited to presenting her position that the eighth grade cutoff established by the Commissioner was arbitrary and without a basis in law.

The Intervenor argues that if eighth graders are permitted to continue on to THS, then not permitting seventh graders to also do so can only be explained as arbitrary. She asserts that from an educational point of view, her situation is no different from that of an Englewood Cliffs student who has completed the first year at THS, and she urges us to restore the recommended decision of the ALJ.

III

As set forth above, disposition of this matter in its entirety requires that the State Board of Education pass upon the Commissioner's determinations of the three central claims made by the parties. While we must consider each claim under the

particular legal standards applicable thereto, the claims are interrelated in that resolution of each turns upon assessment of the racial composition of the pupil populations of the districts involved and the changes which occurred therein during the period relevant to this litigation.

Thus, underlying this entire case is the question of whether the State's constitutionally-derived policy with respect to segregation and imbalance as it applies to New Jersey's public schools is contravened by the grant or denial of the specific relief sought by the parties. Further, although not expressly considered by the Commissioner, in view of our supervisory responsibilities, we cannot ignore the question of whether our State's policy is properly effectuated by our ultimate disposition of this case.

Therefore, as we have reviewed the specific claims in this matter, we have been particularly attentive to the judicial decisions which have considered the legal effect of segregation and racial imbalance in the public school system. In so doing, we have recognized that the courts have not yet been presented with the circumstances now confronting us and, consequently, have not addressed many of the questions raised by this case.

The United States Supreme Court's decision in *Brown* settled that state action in establishing and maintaining a system of racially segregated schools through official state policy violated the United States Constitution. In *Booker* and *Jenkins,* the New Jersey Supreme Court firmly established that our State's constitution and policies derived thereunder prohibited with equal vigor segregation-in-fact resulting from longstanding housing and economic discrimination and rigid application of neighborhood school districting, *i.e., de facto* segregation, rather than from official policy.

Appendix C

In *Booker,* the New Jersey Supreme Court confronted a situation involving apportionment of black students among the elementary schools within a single school district. In resolving that case, the Court settled that the Commissioner had an affirmative obligation to take remedial action where he is presented with an excessively high concentration of black students in a particular school within a given school district in contrast to the percentage of blacks in the schools of the same level in that district such that the school in question is known as a black school.

In *Jenkins,* the Court reaffirmed the principles enunciated in *Booker* and applied them in the context of a sending-receiving relationship between two districts. The Court held that the Commissioner not only had the authority to deny severance of the sending-receiving relationship existing at the high school level, but also had the power to take suitable steps to effectuate a K-12 merger between the two districts. The Court found that it was unnecessary under the compelling circumstances of that case, which included the unique fact that the two districts involved constituted a single community, to pursue the issue of merger in its broader aspects. The Court, however, reiterated that the Commissioner had both the responsibility and power for correcting *de facto* segregation which is frustrating our State constitutional goals, and emphasized that our State's policy against racial discrimination and segregation in the public schools matches in vigor its policy in favor of a thorough and efficient education.

By its decisions in *Booker* and *Jenkins,* the New Jersey Supreme Court broadly delineated the State's constitutionally-derived policy and the Commissioner's responsibilities thereunder where *de facto* segregation by race is presented by apportionment of students among the schools of a single district or among those of

two districts constituting what is in fact a single community. The Court has not been presented with, and so has not considered, as we must in the case now before us, questions relating to the meaning and application of the State's policy in a situation where the fundamental judgment to be made relates to the balance among both racial and national origin groupings in the student population of the single high school in a given district.

Thus, while we fully agree with the Commissioner that the State's policy against segregation is implicated in this matter, we find that the novelty and complexity of the situation with which we have been presented requires extreme care in applying that policy to the specific facts of this case as they have been established in the record. Further, we believe that not only must the individual claims be assessed in the context of the State's policy, but that the adequacy of any remedy ultimately afforded must be measured under that policy. It is to these tasks that we now turn.

A.

The events leading up to this action began in 1965, when the Cliffs Board, lacking high school facilities of its own, entered into the instant sending-receiving agreement with the Englewood Board. Under the contractual agreement, the Englewood Board agreed to construct additional high school facilities at Dwight Morrow High School in reliance upon receiving students from Englewood Cliffs beginning in September 1967. Prior to entering its relationship with the Englewood Board, Englewood Cliffs had been sending its high school students to Fort Lee under an agreement dated November 2, 1962.

Throughout the 1970's, the percentage of graduating eighth graders in the Englewood Cliffs district moving on to DMHS

remained steady in the 60% range, peaking at 69% (34/49) in 1980-81, when a total of 159 Englewood Cliffs students attended DMHS. P-109, in evidence.[4] Nonetheless, Englewood Cliffs petitioned the Commissioner in 1977 pursuant to *N.J.S.A.* 18A:38-13 as then in effect,[5] seeking to terminate the relationship. In 1981, the Cliffs Board withdrew its petition, having concluded that it was not capable of being supported in fact.

Between 1981-82 and 1987-88, the number and percentage of Englewood Cliffs eighth grade graduates enrolling at DMHS declined sharply. P-109, in evidence. By 1987-88, the most recent year in the record, a total of 21 Englewood Cliffs students attended DMHS —15 whites, 4 Asians and 2 Hispanics.[6] The racial breakdown by grade of those students was stipulated by the Englewood Board as follows:

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4. The Cliffs Board states as fact in its brief that enrollment of Englewood Cliffs students at DMHS has been declining continuously since the early 1970's, and cites enrollment in 1971-72, 1979-80, 1982-83 and 1987-88 to support this factual contention. Cliffs Board's brief in support of appeal, at 3. We note that while the percentages offered are accurate for those years, the only years from 1970-71 through 1980-81 during which the percentage of Englewood Cliffs students attending Dwight Morrow fell below 60% were 1977-78 and 1979-80. P-109, in evidence. As set forth above, the "continuous" decline in enrollment began in 1981-82.

5. *See supra* note 1.

6. We note a minor discrepancy in the number and percentage of Englewood Cliffs eighth grade graduates enrolling in DMHS in 1987-88. While the parties and the decisions below refer to 4.4% (2/45), apparently based upon figures contained in the Englewood Board's 1988-89 application for state school aid, our review of the record indicates that the Englewood Board modified those figures by stipulating that there were 3, rather than 2, Englewood Cliffs students attending ninth grade at DMHS that year, R-234, in evidence, in which case the correct statistic would be 6.6% (3/45).

Appendix C

Grade 9: 2 White, 1 Hispanic
Grade 10: 1 White, 1 Asian
Grade 11: 2 Asian, 1 Hispanic
Grade 12: 12 White, 1 Asian

R-234, in evidence.

During that same period, the composition of the student population of DMHS in terms of the racial and national origin groupings represented therein shifted. In 1982-83, the student population of the school was 55.5% black, 31.5% white, 10.3% Hispanic and 2.7% Asian in a total pupil population of 1,128. By 1987-88, the proportion of students who were black and Hispanic had increased to the point where the composition of DMHS's 799 students[7] was 66.2% black, 17.8% Hispanic, 3.9% Asian and 11.8% white.

The shift in the composition of the student population is even more apparent if figures for the most recent incoming classes on record are analyzed alone. While the twelfth grade class at DMHS in 1987-88 was nearly 21% white and 75% black/Hispanic, the ninth and tenth grade classes were each nearly 87% black/Hispanic and 10% and 7.7% white, respectively. R-231, in evidence. 16% of the 94 white students attending DMHS that year were from Englewood Cliffs.

In 1982-83, in the face of declining enrollments, the Tenafly Board, acting under authority of *N.J.S.A.* 18A:38-3, instituted a program for the admission of nonresident students to its public

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7. We note that all three districts experienced declining enrollments during the period involved herein.

schools, including THS, on a tuition basis under criteria established by the Board. Although the Cliffs Board had a sending-receiving relationship with Englewood, the Englewood Cliffs administration took a favorable view towards the program. Prior to its institution, as part of the feasibility report to the Tenafly Board concerning the program, Tenafly's Superintendent reported that "[i]n an informal discussion with Dr. Harold France, Superintendent of Schools in Englewood Cliffs, Dr. France noted that it would be most interesting if and when the Tenafly Board of Education decided to admit non-resident tuition students." R-22, in evidence. Once the program was adopted by the Tenafly Board, Englewood Cliffs provided written instructions upon request to the parents of its students on how to apply to Tenafly High School for admission on a tuition basis. R-93, in evidence. It did not provide such instructions with respect to any other school. Tr. 1/12/87, at 209.

Further, while the Cliffs Board had placed special emphasis since 1974-75 on seeking to enhance the likelihood that its students would continue their education at Dwight Morrow, such special efforts continued only until 1981-82. Tr. 1/7/87, at 173. During 1980-81, several "cottage parties" were held at which board members from Englewood Cliffs and Englewood were available to answer questions about Dwight Morrow. In addition, department chairs from Dwight Morrow presented information concerning Englewood's program at meetings of the Cliffs Board. These attempts, however, ceased after only one year. Tr. 1/7/87, at 167-68.

Since the inception of Tenafly's tuition program, the number of Englewood Cliffs students attending THS has increased dramatically. At the same time, the number of Englewood Cliffs students attending DMHS has dropped on a yearly basis:

Appendix C

CHART I

	Englewood Cliffs Students Attending Dwight Morrow High School	Englewood Cliffs Students Attending Tenafly High School
1982-83	119	11
1983-84	92	21
1984-85	73	33
1985-86	60	48
1986-87	35	62
1987-88	21	76

P-109; R-232; CR-25; CR-107; R/CR-20, in evidence.

By 1985-86, the year in which this action was initiated, there were 74 nonresident private tuition students attending THS. This was nearly three times the number enrolled in any other high school district in the state, of which only 43 had nonresident tuition students in attendance. Of those, only 16 had more than five nonresident tuition students. R-1, in evidence.

By 1987-88, the number of tuition students at THS had increased to 107, of which 76 were from Englewood Cliffs and 16 from Englewood. CR-107, in evidence. Through 1985-86, nonresident tuition students at THS were overwhelmingly white and Asian:

Appendix C

CHART II

NONRESIDENT TUITION STUDENTS ATTENDING TENAFLY HIGH SCHOOL

	Englewood Cliffs[8] Residents				Englewood Residents				Residents of Other Districts			
	W	B	H	A	W	B	H	A	W	B	H	A
1982-1983	9	0	0	2	5	0	0	0	4	0	0	0
1983-1984	18	0	0	3	14	3	1	1	7	0	0	1
1984-1985	28	0	1	4	21	3	2	1	19	0	0	2
1985-1986	38	0	2	8	15	2	0	0	8	0	0	4

CR-25, in evidence.

The 891 students attending THS in 1987-88 included only 5 (0.6%) blacks and 8 (0.9%) Hispanics. The remaining 98.5% were white (80.7%) and Asian (17.8%). At DMHS, however, the proportion of blacks had grown to 66.2% and Hispanics to 17.8%.

8. We note that while CR-25, in evidence, indicates that only one Asian student from Englewood Cliffs attended THS in 1984-85, it is evident from a full analysis of the exhibit that that figure was in error and that, in fact, there were 4 Asians from Englewood Cliffs in attendence that year.

Appendix C

CHART III

COMPOSITION OF STUDENT POPULATIONS BY RACE AND NATIONAL ORIGIN

	Englewood Cliffs K-8 1987-88		Englewood DMHS 1982-83		Englewood DMHS 1987-88		Tenafly THS 1987-88	
White	247	(50.8%)	355	(31.5%)	94	(11.8%)	719	(80.7%)
Black	7	(1.5%)	626	(55.5%)	529	(66.2%)	5	(0.6%)
Hispanic	27	(5.5%)	116	(10.3%)	142	(17.8%)	8	(0.9%)
Asian	205	(42.2%)	31	(2.7%)	31	(3.9%)	159	(17.8%)
Other	0		0		3		0	
	486		1,128		799		891	

P-166; P-264; R-231; CR-114, in evidence.

While Englewood is a heterogeneous community, Englewood Cliffs and Tenafly, as reflected in their student populations, are overwhelmingly white with growing Asian populations:[9]

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9. We note that although grouped with whites in the proceedings below, Asians are not considered a racial grouping for purposes of desegregation, but rather are considered a distinct national origin group. NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF EQUAL EDUCATIONAL OPPORTUNITY, GUIDELINES FOR THE DESEGREGATION OF PUBLIC SCHOOLS IN NEW JERSEY (1989). Moreover, there is no question that individuals of Asian descent are not considered members of the white majority for purposes of establishing violation of the equal protection guarantee of the United States Constitution. *E.g., Korematsu v. United States*, 323 *U.S.* 214 (1944); *Yick Wo v. Hopkins*, 118 *U.S.* 356 (1886).

Appendix C

CHART IV

COMPOSITION OF COMMUNITIES BY RACE AND NATIONAL ORIGIN
1980 Census

	Englewood Cliffs		Englewood		Tenafly	
	Gen. Pop.	School Age Pop.	Gen. Pop.	School Age Pop.	Gen. Pop.	School Age Pop.
White	85.0%	84%	44.6%	37%	91.3%	88%
Black	0.8%	Less Than 1%	40.6%	48%	0.6%	Less Than 1%
Hispanic	3.9%	4%	8.8%	11%	3.0%	4%
Asian	9.3%	12%	2.8%	3%	4.5%	7%
	Pop.:	5,698	Pop.:	23,701	Pop.:	13,552

Initial decision, at 7-8; P/CR-1, in evidence.

It is in the context of the racial/national origin groupings represented in the three communities and their student populations as delineated above, as well as in the context of the shift in the balance among these groupings at Dwight Morrow High School, that we must consider the three central claims in this case.

B.

The threshold question in this case is whether the State Board of Education should direct termination of the sending-receiving relationship between Englewood and Englewood Cliffs so as to permit Englewood Cliffs to establish a sending-receiving relationship with Tenafly. That question must be resolved under *N.J.S.A.* 18A:38-13, which provides that, in acting upon

applications for a change of designation of a high school or withdrawal from a sending-receiving relationship, the Commissioner:

> shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.

As set forth above, both the ALJ and the Commissioner determined that a change in designation could not be permitted in this case. This determination was based on the finding that termination of the relationship between Englewood and Englewood Cliffs would have a substantial negative impact on the racial composition of the student population at Dwight Morrow and, related thereto, a substantial negative impact on the quality of education provided by that school.

We agree with the ALJ and Commissioner that Englewood Cliffs should not be permitted to terminate its relationship with Englewood. However, although we have arrived at the same conclusion, we have approached this matter from a different perspective.

Initially, we emphasize that the student populations of the districts involved here are comprised not only of two racial groupings, black and white, but include two national origin

groupings as well — Hispanic and Asian.[10] Had Englewood Cliffs been permitted to change its designated receiving district in 1987-88, the 21 Englewood Cliffs students who had been attending Dwight Morrow would instead have been assigned to attend Tenafly High School. As previously noted, of those 21 students, 15 were white, 4 were Asian and 2 were Hispanic. Departure of these students would have altered the composition of the student population of Dwight Morrow from 11.8% (94/799) white, 66.2% (529/799) black, 17.8% (142/799) Hispanic, and 3.9% (31/799) Asian to 10.2% (79/778) white, 68% (529/778) black, 18% (140/778) Hispanic, and 3.5% (27/778) Asian.

Statistically, while representing a loss of 16% of the white student body, the effect of this loss on the student population of Dwight Morrow would have been to decrease the proportion of white students by 1.6%.

Viewed in isolation at that particular point in time, this change might not in itself constitute a substantial negative impact on the racial composition of the student population attending Dwight Morrow. Nor, as set forth in the decisions below, would the loss of the 21 Englewood Cliffs students have affected the structure or substance of the educational program provided by Dwight Morrow.

Thus, were the circumstances of this case so limited, we might have reached a conclusion different than the Commissioner's. However, *N.J.S.A.* 18A:38-13 requires that any determination with respect to a requested change in designation must be based upon consideration of "*all* the circumstances" (emphasis added), and, consequently, the language of the statute precludes us from taking such a narrow view.

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10. *See supra* note 9.

Appendix C

As reflected by the claims of the parties, the circumstances here are unique in that by 1987-88, the majority of Englewood Cliffs high school age students attending public school were not attending Dwight Morrow, their designated receiving school, but rather were attending Tenafly High School on a tuition basis. Given that circumstance and the legal import of the sending-receiving relationship between Englewood and Englewood Cliffs, we conclude that assessment of the impact of termination must include consideration of the effect of Tenafly's acceptance of tuition students from Englewood Cliffs on the composition of Dwight Morrow's student population. To do otherwise would avoid assessment of the true impact of the change sought by Englewood Cliffs and would give legal sanction to the *de facto* change in designation that has occurred in this case.

While the impact of the formal change alone might not be considered significant at this point, the impact of the change that has actually occurred cannot be judged insignificant. Had Englewood Cliffs sought the formal change it now seeks in 1982-83, at which point only 11 of its students were attending THS, termination of its relationship with Englewood would have involved the withdrawal from Dwight Morrow of 119 students, rather than the 21 attending Dwight Morrow in 1987-88. A change in designation under those circumstances would have directly resulted in a decrease in the proportion of whites in the student population by approximately 6.5%,[11] as contrasted with the 1.6% decrease that, based upon conservative assessment, would have directly resulted from termination in 1987-88.

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11. We note that, inasmuch as the record does not indicate the specific racial breakdown of Englewood Cliffs students attending DMHS in 1982-83, we have applied the 1980 census figures for the school age population of Englewood Cliffs in calculating the approximate decrease in the proportion of white students at DMHS had the Cliffs Board been granted a change in designation in 1982-83.

Appendix C

There is no question that we would have found the impact of withdrawal in 1982-83 to be substantial and, absent a compelling reason for permitting withdrawal,[12] would have denied the Cliffs Board's petition at that point. We will not now allow our vision to be so limited as to permit Englewood Cliffs, whose conduct can at best be seen as acquiescence to the departure of a significant portion of its students from its designated receiver, to now claim on the basis of that departure that a formal change in designation would have no significant impact.[13]

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12. *See supra* note 1.

13. We reject Englewood Cliffs's assertion that our analysis rests on "some alternate state of facts that may have existed at an earlier time." Exceptions on behalf of Cliffs Board, at 4. To the contrary, the fact that a substantial number of its students were attending Tenafly High School is a significant circumstance which existed at the time of the application and which did not alter prior to the time that the Commissioner rendered his decision. Furthermore, contrary to Englewood Cliffs' contentions, it is not the policy of the State Board of Education to ignore circumstances which have contributed materially to a given situation. In this respect we note that *In the Matter of the Application of the Board of Education of the Borough of Milltown to Terminate its Sending-Receiving Relationship with the Board of Education of the City of New Brunswick*, 1976 *S.L.D.* 854, *appeal dismissed* by the Appellate Division, December 6, 1976 (previous history omitted), cited by Englewood Cliffs in its exceptions to our Legal Committee's Report, does not support its proposition. Central to that matter was the ineffectiveness of measures which had been directed in an earlier decision concerning the sending-receiving relationship between the parties. *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick and Board of Education of the Borough of Milltown*, 1974 *S.L.D.* 962, *aff'd* by the State Board, 1975 *S.L.D.* 1110. After that decision was rendered, the circumstances altered and the parties agreed to severance. Consequently, the hearing examiner's report and the State Board's decision adopting that report focused on the circumstances in the relationship of the communities as they had altered since the time of the earlier decision.

In this respect, we emphasize that, as described by the ALJ, not only is the School District of the City of Englewood fully certified by the State as providing a thorough and efficient education, but DMHS is in fact providing a good solid education which more than adequately prepares its students for college and later life. Given, as established below, the quality of the education provided by DMHS, we find that any educational benefits of permitting the change sought here are far outweighed by the negative educational implications of allowing it.

As set forth above, in the landmark case of *Brown, supra,* the U.S. Supreme Court settled that state action in establishing and maintaining a system of racially segregated public schools through official state policy violated the United States Constitution. In reaching its decision, the Court rejected the proposition that a public school system could provide equal educational opportunity where children were segregated by law solely on the basis of race. Finding that education is perhaps the most important function entrusted to state and local governments, the Court predicated its holding on its recognition that even if the education provided by segregated schools was the same in all other respects, segregated schools generated feelings of inferiority in the minority children forced to attend them. The Court concluded that segregated schools were, therefore, inherently unequal.

Again, *Booker* and *Jenkins* firmly established that our State's constitution and policies derived thereunder prohibit with equal vigor *de facto* segregation. Furthermore, those cases settled that, whether or not the federal Constitution compelled action to eliminate or reduce *de facto* segregation, it did not preclude such action by State school authorities in furtherance of State law and State educational policies. By its decisions, the New Jersey Supreme Court recognized that sound educational policy embraces

the fundamental educational principles upon which the *Brown* decision rests. As expressed by the New Jersey Supreme Court:

> In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by.

Jenkins, supra, at 499, *quoting Booker, supra,* at 170-71.

Thus, the Court recognized that *de facto* segregation has an undesirable effect upon attitudes related to successful learning and

denies equal educational opportunity to minority students. *E.g., Booker, supra,* at 178. Further, as reflected in our State's constitution, these principles apply not only to racial segregation, but to segregation based on religion, color, ancestory and national origin as well. New Jersey Constitution, Article I, para. 5. Thus, where policies, practices or conditions exist such that students within a district are separated on the basis of religion, race, color, ancestory or national origin, the New Jersey Department of Education requires that the district act affirmatively to correct the situation. N.J.A.C. 6:4-1 *et seq.*; N.J.A.C. 6:8-4.3(9). See, *e.g., In the Matter of the Board of Education of the Township of Hillside,* decided by the Commissioner, June 10, 1980, *aff'd,* by the State Board, November 5, 1980, *aff'd,* Docket #1689-80-T4 (App. Div. 1982); *Walker v. Board of Education of the City of Englewood,* decided by the Commissioner, May 19, 1955.

We recognize that there is no fixed balance between racial and national origin groupings that, from an educational perspective, can be considered ideal for all communities. *Booker, supra,* at 178-80. However, were we to sanction termination of the sending-receiving relationship between Englewood and Englewood Cliffs, we would be condoning a concentration of blacks and Hispanics that is sharply out of balance with the composition of the society in which those students must function. *See Booker, supra.* Further, the concentration of minority students would be at such level as to allow Dwight Morrow to be characterized as a minority school with the attendant "sense of stigma and resulting feeling of inferiority" cited by the Court in *Booker* and upon which the *Brown* decision rests.

Thus, as a matter of educational policy, we could not condone the level of concentration of minority students attending Dwight Morrow by sanctioning the change in designation sought here. In this respect, we emphasize that:

Appendix C

> Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all.

New Jersey State Board of Education, A Statement of Educational Policy, November 5, 1969.

Such educational considerations do not include the beliefs and social values of the individuals attending a particular school. Rather, as set forth above, resolution of the legal and policy questions with which we have been presented rests on fundamental educational principles applicable in all educational settings as those principles have been expressed in the decisions of the United States and New Jersey Supreme Courts. Therefore, in resolving these questions, we have neither relied upon nor considered the proofs developed from interviews with students attending DMHS and THS concerning their beliefs and social values, which were submitted into evidence to show that "symbolic loss" would occur in this case. *Cf. In the Matter of the Board of Education of the Township of Hillside, supra,* Commissioner's decision, at 22, State Board's decision, at 28a-29a, Appellate Division's decision, at 2-3. In this respect, we specifically find that whatever evidentiary value Dr. Fine's "report" might have does not justify intruding upon the privacy of students by interviewing them for purposes of this litigation concerning their beliefs and feelings on matters of race relations. *See Board of Education of the Borough of Merchantville v. Board of Education of the Borough of Pennsauken v. Board of Education of the Board of Haddonfield,* Decision on Motion by the State Board of Education, October 6, 1989 (John T. Klagholz, dissenting).

Appendix C

In sum, given the balance between racial and national origin groupings that would exist were we to permit termination of the sending-receiving relationship between Englewood and Englewood Cliffs and the negative educational implications thereof, we deny Englewood Cliffs' petition. Such a limited ruling, however, would do nothing to correct the imbalance that has developed at Dwight Morrow over the last five years. We believe that we would be denying both our authority and responsibility for proper implementation of our State's educational policies were we to sanction this imbalance by failing to take such steps as are necessary to correct it.

We recognize that neither the State Board of Education nor the Commissioner has an obligation to act affirmatively by consolidation of districts or otherwise to alter the composition of the pupil population of a given district solely because of a fortuitous concentration of minority students in that district. In this instance, however, Englewood Cliffs has brought the question before us, and, hence, it is our responsibility to resolve it. *Cf. Booker, supra,* at 178.

The record herein is clear that a significant number of high school age students from Englewood Cliffs were not attending Dwight Morrow, their designated high school, when the Commissioner rendered his decision in this matter, yet had remained in the public school system. It is equally clear that a significant portion of these students were attending Tenafly High School as tuition students and that the number of such students has increased steadily since Tenafly initiated the program. This increase has been mirrored in the continual decline in the number of Englewood Cliffs students attending Dwight Morrow.

It is impossible to ignore the fact that the overwhelming

majority of those Englewood Cliffs students were white, and that their numbers were significant enough to account for the shift in the balance between the various racial and ethnic groupings that occurred at DMHS during the six year period following the initiation of Tenafly's tuition program. We also recognize that, although not as significant as the number of white students from Englewood Cliffs who attended THS during the period relevant to this litigation, a smaller number of white students from Englewood also withdrew from the Englewood school community during this period while remaining in the public school system by attending THS as tuition students.

In short, the record shows clearly the trend toward withdrawal from the Englewood school community by members of the white majority from both Englewood and Englewood Cliffs during the relevant period. As a result, the proportion of Dwight Morrow's student population that was black or Hispanic rose from 65.8% in 1982-83 to 84% by 1987-88. Under these circumstances, we cannot give State sanction to the continued admittance of increasingly large numbers of white students from Englewood and Englewood Cliffs by a neighboring district to its public high school where that school's pupil population is already 80.7% white and but 1.5% black or Hispanic.

Given the circumstances with which we have been presented, we have the responsibility to exercise fully our jurisdictional authority with respect to the public school system so as to remedy this situation. We conclude that the first step in achieving the kind of balance which would effectuate our State's policy is for the State Board of Education to direct such measures as will ensure that high school age students from Englewood and Englewood Cliffs will attend Dwight Morrow, their assigned school, if they attend public school. We therefore conclude that it is necessary to limit the

discretion of other public school districts, including Tenafly, to accept high school students who are residents of Englewood or Englewood Cliffs on a tuition basis or otherwise.

In arriving at this conclusion, we reject the view that our authority to direct such relief under the circumstances presented here is limited by the discretion afforded local districts by *N.J.S.A.* 18A:38-3 or by the right of parents to seek admission to school districts other than their districts of residence pursuant to that statute.

N.J.S.A. 18A:38-3 provides that:

> Any person not resident in a school district, if eligible for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.

Although enacted to ensure that the children of migrant laborers and other children temporarily residing in New Jersey would be entitled to an education while in our state, Statement accompanying S. 216, L. 1947, c. 138, the statute does not preclude a district board from adopting admission policies aimed at alleviating declining enrollment, as did Tenafly, or from admitting nonresident students under such policies.

However, the discretion afforded by *N.J.S.A.* 18A:38-3 does not create an absolute right for district boards to admit nonresident students on a tuition basis or otherwise. Nor can we identify any other source in law which would confer such right where admittance of students by a given district pursuant to the statute has

contributed significantly to deterioration in the balance among racial and national origin groupings represented in the pupil population of another district.

As the State Board of Education has long recognized:

> *N.J.S.A.* 18A:38-3 imposes no mandatory course of action on any local board. It allows discretionary action by such a board in certain situations if a board is so inclined to act. We see no conflict between the principles of *Booker* and Jenkins as here involved and the provisions of the cited statute and even if there were, the educational goal and objectives underlying *Booker* and *Jenkins* would have to be given primacy.

Shore Regional, supra, at 229.

We repeat that, as established by *Booker* and *Jenkins,* our State's policy against discrimination and segregation in the public schools is of such vigor and import as to match its policy in favor of a thorough and efficient education. Accordingly, where a question involving the exercise of discretion by a district board is brought before this agency, the Commissioner and the State Board of Education have both the power and responsibility to limit the exercise of that discretion, and, where reasonable and feasible, to direct such remedy as necessary to effectuate our State's policy. *Jenkins, supra,* at 505; *Booker, supra,* at 178.

Furthermore, there is no question that the Commissioner and the State Board have the responsibility to counter trends towards

withdrawal from the school community by members of the white majority. *Booker, supra,* at 180. Consequently, we must have the accompanying power to limit the exercise of discretion by district boards to the extent necessary to counter such withdrawal.

As expressed by the Commissioner:

> Public high schools in this State are created primarily for the purpose of serving the resident pupil population and those students from *bona fide* sending districts approved by the Commissioner and the State Board of Education. Certainly, the intent of *N.J.S.A.* 18A:38-3, *supra,* is not to provide an avenue permitting individual parents or local boards of education to circumvent the law requiring the integration of the public schools.

Shore Regional, supra, at 227.

We recognize that, as established below, Tenafly did not act with discriminatory intent in adopting its tuition policy or in admitting nonresident students under that policy. We find nothing, however, under State or federal law that would limit the exercise of authority by this agency to situations where a district board has acted with discriminatory intent. *Cf. Booker, supra,* at 170; *Shore Regional, supra,* at 229. To the contrary, we believe that both the Commissioner and the State Board have an affirmative obligation to take such steps as are necessary to correct an imbalance brought before us where, as here, our failure to act would make us a passive participant to the perpetuation of that imbalance. *Cf. Richmond v. Croson,* 488 *U.S.* ___, 109 *S. Ct.* 706, 102 *L. Ed.* 854 (1989).

Appendix C

Similarly, *N.J.S.A.* 18A:38-3 does not confer on parents the right to select from among the public school districts other than their district of residence the one in which their children will attend school. Nor do the United States or New Jersey Constitutions guarantee such a right. While the equal protection guarantees of the United States and New Jersey Constitutions guarantee equal educational opportunity, and while our State Constitution guarantees a thorough and efficient education, there is no constitutionally protected right to attend the public school of one's choice. Again, we emphasize that, as the State Board recognized in *Shore Regional,* where there is a conflict between the provisions of *N.J.S.A.* 18A:38-3 and the constitutionally-derived policy expressed in *Booker* and *Jenkins,* the State's policy must be given primacy.

As previously stated, we find that in order to properly effectuate our State's policy in this instance, we must limit the discretion of *all* district boards, including Tenafly, to admit to their public high schools any students resident of Englewood or Englewood Cliffs. This measure would counter the withdrawal of white high school students from those districts by eliminating the option that while withdrawing from their designated school, students could remain within the public school system.[14]

However, we do not believe that the trend toward withdrawal from the Englewood public school community by the white majority can be reversed by this directive alone. As has long been recognized, such trends can be effectively countered only if parents, students and citizens come to understand the democratic and educational benefits of maintaining heterogeneous student

14. While no other public school district has sought to participate in this matter, we recognize that some students from Englewood and Englewood Cliffs may be attending public high school in districts other than Tenafly.

populations. Such understanding, however, does not develop in a vacuum. Rather, school districts must play a leadership role in promoting a positive view of the benefits of such an educational environment so that all members of the school community may work cooperatively toward that objective.

In this instance, given the legal relationship between Englewood and Englewood Cliffs, the Cliffs Board had the obligation to fulfill that leadership role and to encourage its students to attend their designated receiving school, rather than facilitating their withdrawal from the Englewood school community. Its failure to act consistently with its legal relationship with Englewood exacerbated the trend toward withdrawal that developed.

We find it incumbent upon the Cliffs Board to effectuate its sending-receiving relationship with Englewood by taking all steps necessary and feasible to reverse that trend. We therefore direct that the Cliffs Board develop a plan detailing a course of action for preparing its students for entry to Dwight Morrow and for encouraging such attendance. Such course of action shall be aimed at maximizing the proportion of its student body enrolling at Dwight Morrow by minimizing the anxieties of students and parents related thereto so that they may fully realize and appreciate the educational benefits of doing so. We direct the Cliffs Board to develop such a plan cooperatively with the Englewood Board and, as directed by the order appended to this decision, to submit its plan to the Commissioner upon adoption for his review and approval.

We recognize that, as described in the ALJ's initial decision, the Englewood Board has already implemented reforms aimed at both improving the education provided at Dwight Morrow and building greater support for that school in the community. Such

efforts must not only continue, but must intensify if the trend that has developed here is to be reversed. Furthermore, the Englewood Board must work in close cooperation with the Cliffs Board both with respect to issues related to Dwight Morrow's future direction and in ensuring that the school's educational goals and mission are clearly and positively presented to Englewood Cliffs students and parents.

Although presented to us as a sending-receiving case, this matter has raised questions of fundamental State policy and this agency's responsibilities thereunder. It has been twenty years since our State Supreme Court has had the occasion to confront such questions in the context of public education. Furthermore, as previously discussed, articulation of our State's constitutionally-derived policy has occurred almost exclusively in a single district setting. While much progress has been made in effectuating our State's policy in that particular setting, that policy has not found judicial, legislative or administrative expression in a multi-district context. By our decision, we would provide that expression.

As set forth above, we have concluded that we have both the responsibility and the authority to direct such measures as are necessary to correct the situation that has been brought before us. Such measures, of course, must be reasonable, feasible and workable. *Jenkins, supra.*

By precluding high school students from Englewood and Englewood Cliffs from withdrawing from their assigned high school while remaining within the public school system, we would forestall further deterioration in the balance among racial and national origin groupings represented in the public school population assigned to Dwight Morrow. By directing the Cliffs Board to fulfill its leadership responsibilities arising from both its

legal relationship with Englewood and our State's educational policies, we would create the context necessary to reverse the trend that has developed in this case.

These directives flow from our recognition that we cannot stand idly by while another urban/suburban split with the attendant educational implications indicated herein is perpetuated. We also recognize that, ultimately, additional measures may be necessary to correct this situation. However, we cannot and should not direct measures that are more intrusive than necessary to effectuate our State's policy.

Therefore, while we must fulfill our responsibility to assess the sufficiency of the relief afforded by virtue of our decision, we must consider with equal care whether it is necessary to direct additional remedial measures at this time.

We have carefully reviewed the Commissioner's determination rejecting the Englewood Board's motion for compulsory regionalization or, towards that end, a regionalization study. While we concur that it is neither necessary nor advisable for this agency to actively pursue compulsory regionalization at this point, we do so for reasons different than those expressed by the Commissioner.

We firmly reject the view taken by the Commissioner that regionalization may be directed only in cases where the districts involved constitute, as in *Jenkins,* a "single community." While this circumstance was pivotal to the Court's holding in that case and eliminated the necessity of pursuing the issue of merger in its "broader aspects," *Jenkins, supra,* at 505, the Court acknowledged that the community involved was "probably a unique one in our State." *Id.* at 485. To read *Jenkins* as ***requiring*** that the districts

involved constitute a single community before this agency has the power to direct a cross-district remedy such as regionalization is to be overly restrictive, and would be tantamount to a disavowal of our power.

We do not doubt the breadth of our powers under the State Constitution and implementing legislation. *See Jenkins, supra,* at 494. Nor do we question our responsibility to effectuate our State's policy against segregation with the same vigor as we implement its policy in favor of a thorough and efficient education. *Id.* at 495.

We would not hesitate to exercise our powers fully and to cross district lines, by directing regionalization or otherwise, where it has been demonstrated that such a remedy was necessary to vindicate our State's policy against segregation, and where to do so was "reasonable, feasible and workable." *Id.* at 505. We conclude, however, that the circumstances as they have been presented to us do not call for such a remedy, at least not at this juncture.[15]

As set forth above, we have directed that certain measures be taken both to ensure that all high school students from Englewood and Englewood Cliffs will attend their assigned school if they attend public school and to maximize the proportion of students choosing to attend public school rather than parochial or private school. In this respect, we recognize that the balance among the racial and national origin groups at Dwight Morrow has been affected to some degree by the number of students who have chosen to attend parochial or private schools upon entering high

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15. We note that our conclusion that it is not necessary for this agency to pursue compulsory regionalization at this time in no way infringes upon the ability of the districts involved in this litigation to pursue voluntary regionalization pursuant to *N.J.S.A.* 18A:13-1 *et seq.*

school, or, as claimed by the Cliffs Board, in the lower grades. However, we do not possess the authority to compel students to attend public school rather than private or parochial school. *Pierce v. Society of Sisters*, 268 U.S. 510 (1924).

Moreover, although an increase in the number of those high school students choosing to attend public school undoubtedly would have a positive effect on the composition of the pupil population at Dwight Morrow, there is nothing in the record to indicate that the proportion of the high school age population of Englewood attending private or parochial school increased during the period relevant to this litigation. Moreover, the proportion of public school students from Englewood Cliffs who have chosen to continue their education in the public school system upon completion of eighth grade has remained steady during the period relevant to this litigation. In short, as previously discussed, it is the fact that high school age students from Englewood Cliffs and Englewood withdrew from Dwight Morrow while remaining in the public school system by attending Tenafly High School that accounts for the deterioration in the balance between racial and national origin groupings at Dwight Morrow since 1982-83.

Consequently, we have focused the exercise of our authority toward ensuring that high school age students from Englewood and Englewood Cliffs will attend their designated school if they remain in the public school system. We recognize that it is impossible to predict with certainty the degree to which these measures will succeed in reversing the trend that has developed here. However, we *can* assess whether the remedy that would be afforded by virtue of our decision will be sufficient if successfully implemented.

Had a return of Englewood and Englewood Cliffs students attending Tenafly High School been successfully effectuated in

1987-88, the pupil population of Dwight Morrow would have been comprised of approximately 16% white, 62% black, 16% Hispanic and 6% Asian. R-4a, in evidence. While not equally balanced, such a student population is both multi-racial and multi-cultural. Given that there is no fixed balance between racial and national origin groupings that can be considered ideal for all communities, such balance, if achieved, might well afford all students who attend Dwight Morrow the educational advantages of a heterogeneous student population. *See Booker, supra,* at 178-80. In that it has not been shown that more intrusive measures than those we have directed are necessary at this juncture in order to vindicate our State's constutionally derived policy, we conclude that it would be premature for this agency to pursue compulsory regionalization at this point.

However, notwithstanding this conclusion, we recognize that it is our responsibility to ensure that the situation is in fact corrected. We therefore direct, as specified in the order appended hereto, that the Commissioner monitor the composition of the pupil population at Dwight Morrow so as to assess the effectiveness of the measures we have directed and to formally report to us on a yearly basis for the next five years as to the progress being made.

In this respect, we have concluded that it is essential that our directives apply uniformly to all high school students from Englewood and Englewood Cliffs so that our objective in directing the measures herein may be achieved. Accordingly, we have rejected the Intervenor's arguments that, as the ALJ recommended, all students from Englewood and Englewood Cliffs enrolled in the school district of Tenafly at the time of the initial decision, regardless of grade level, should be permitted to attend Tenafly High School. Although we recognize that our decision may require

some students in the lower grade levels who are enrolled in the Tenafly district to alter their plans with respect to their high school education, such impact is not significant enough to warrant undermining our decision by exempting all such students from its terms.

We find that the eighth grade cut-off established by the Commissioner drew the line at the point where the measures we have directed will be most effective while having the least educational impact on the students affected by the preclusion. By exempting students attending Tenafly High School at the time of the initial decision, an exemption to which Englewood consented, the Commissioner prevented disruption in the high school education of those students. Exemption of students enrolled in and attending eighth grade in the Tenafly district at the time of the initial decision was appropriate in that those students would otherwise have been forced to make alternative arrangements for their high school education in less than two months, given that the Commissioner did not render his decision until July 11, 1988.

In that we have limited the discretion of other public school districts to accept high school students who are residents of Englewood or Englewood Cliffs on a tuition basis or otherwise, we exempt from our decision, for the same reasons, those students from Englewood and Englewood Cliffs who are enrolled in and attending public high schools in districts other than Tenafly on the date of this decision, and allow them to continue on to graduation at their current high school.

Such considerations, however, are not present in Intervenor's case. As a *seventh* grader at the time of the ALJ's initial decision, she had more than a year after the Commissioner's decision to make plans for her high school education.

Appendix C

Finally, we reserve judgment on Tenafly's appeal of the Commissioner's decision of September 6, 1989, in which he determined that, by virtue of his substantive decision, Tenafly was foreclosed from admitting to Tenafly High School, pursuant to its employment practices, a child of an Englewood resident employed by the school district of Tenafly. In that resolution of the questions involved in that appeal relate solely to a limited class of students and is controlled by this decision, we now direct that a briefing schedule be established so as to permit us to consider Tenafly's appeal.

Regan Kenyon opposed.

S. David Brandt opposed on the grounds that the administrative order is too limited.

Attorney exceptions are noted.[16]
April 4, 1990
Date of mailing APR 06 1990

16. We note that following issuance of our Legal Committee's Report, the Tenafly Board declined to participate further in this appeal and therefore did not file exceptions to our Legal Committee's Report.

STATE OF NEW JERSEY
STATE BOARD OF EDUCATION
STATE BOARD DOCKET NO. 37-88

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

PETITIONER/CROSS RESPONDENT-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

RESPONDENT/CROSS PETITIONER-CROSS APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

CROSS RESPONDENT-APPELLANT,

AND

A.S. by her Guardian *ad litem*, R.S.,

INTERVENOR.

ORDER

This matter having been opened before the Commissioner of Education by the filing of a Verified Petitioner by Shanley and Fisher, by John Degan, Esq. and Stephanie C. Rosen, Esq., then attorneys for Petitioner Board of Education of the Borough of

Appendix C

Englewood Cliffs; and said Petition having been answered and a Cross-Petition having been filed by Clapp and Eisenberg, by Arnold K. Mytelka, Esq. and Agnes I. Rymer, Esq., and Paul L. Tractenberg, Esq., attorneys for Respondent/Cross-Petitioner Board of Education of the City of Englewood; and said Cross-Petition having been answered by Riker, Danzig, Hyland and Perretti, by James J. Rothschild, Esq. and Glen D. Curving, Esq., attorneys for Cross-Respondent Board of Education of the Borough of Tenafly; and the Office of Administrative Law having heard and considered the testimony and evidence and arguments of counsel and having issued an Initial Decision on April 18, 1988, recommending that said Petition be denied and that said Cross-Petition be granted in part and denied in part; and the Commissioner of Education having adopted the determinations therein on July 11, 1988; and Notice of Appeal to the State Board of Education having been filed by Hellring, Lindeman, Goldstein, Siegal, Stern and Greenberg, by Joel D. Siegel, Esq., then attorney for Petitioner, and by attorneys for Cross-Respondent; and Notice of Cross-Appeal having been filed by attorneys for Respondent/ Cross-Petitioner; and the State Board of Education having considered same and having determined in part that certain measures must be taken by the Board of Education of the Borough of Englewood Cliffs in cooperation with the Board of Education of the City of Englewood to correct deterioration in the balance among the racial and national origin groupings represented in the pupil population of Dwight Morrow High School, and that determination having been embodied in a written decision issued on April 4, 1990,

It is on this 5 day of April, 1990,

ORDERED that the Board of Education of the Borough of Englewood Cliffs develop and adopt a plan detailing a course of

action for preparing its students for entry to Dwight Morrow High School and for encouraging such attendance; and it is further

ORDERED that the Board of Education of the Borough of Englewood Cliffs develop the plan cooperatively with the Board of Education of the City of Englewood; and it is further

ORDERED that upon adoption, the Board of Education of the Borough of Englewood Cliffs submit the plan to the Commissioner of Education for his approval; and it is further

ORDERED that the Commissioner of Education establish a process by which the plan is to be submitted and approved, and take such steps as are necessary to ensure that the Board of Education of the Borough of Englewood Cliffs submits the plan in such manner that the approval process is completed within one year from the date of this Order; and it is further

ORDERED that within 60 days of completion of the approval process, the Commissioner of Education report to the State Board of Education as to the outcome of the approval process and the substance of the plan, and provide his recommendations as to any additional measures to be taken at that time; and be it further

ORDERED that annually thereafter for a period of four additional years, by each anniversary date of the Commissioner of Education's first report to the State Board of Education as ordered herein, the Commissioner of Education report to the State Board of Education as to the status of implementation of the plan and the results therefrom, and provide his recommendations as to any additional measures to be taken at that time.

Appendix C

s/ Saul Cooperman
Saul Cooperman, Secretary
State Board of Education

s/ James A. Jones
Dr. James A. Jones, President
State Board of Education

s/ Josephine R. Piccolella April 5, 1990
[stamped]
JOSEPHINE R. PICCOLELLA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 18, 1992

APPENDIX D — DECISION OF THE NEW JERSEY COMMISSIONER OF EDUCATION, DATED JULY 11, 1988

COMMISSIONER OF EDUCATION

OAL DKT. NO. EDU 1086-86

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

PETITIONER/CROSS-RESPONDENT,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

RESPONDENT/CROSS-PETITIONER,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

CROSS-RESPONDENT.

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions and reply exceptions were timely filed by the parties and have been thoroughly examined.

There is apparently no dispute that the legal standard embodied in the amended version of *N.J.S.A.* 18A:38-13 is to be applied in this matter notwithstanding the fact that the Petition of Appeal was filed prior to the enactment of the amendments. (Initial Decision, at pp. 3, 66-67) The standard of review articulated in the

current provisions of *N.J.S.A.* 18A:38-13 requires that when deciding whether to approve a request to sever a sending-receiving relationship, the Commissioner

> ***shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts.***

If no substantial negative impact will result from the severance, the Commissioner is required to grant the requested change.

Upon review of the record and noting that no exceptions have been filed with respect to the ALJ's findings and conclusions that no substantial negative impact would result on either finances or facilities if severance were granted (Initial Decision, at pp. 46-47), the Commissioner adopts those findings and conclusions as his own.

In order to reach an equitable determination in this matter, the Commissioner will now consider all the circumstances with respect to the two remaining areas for deciding a request for severance, namely, impact on racial composition and quality of education about which voluminous exceptions and reply exceptions have been filed. Once a determination on the question of severance has been reached, the issues of dual sending-receiving relationship and Tenafly's tuition policy will be addressed. For each of the above-cited areas of consideration, the parties' exceptions will first be summarized whereupon the Commissioner will render a determination on that area based upon

his own independent review of the record including the initial decision, the exceptions, as well as the documentary and testimonial evidence.

I. SEVERANCE

A. ENGLEWOOD CLIFFS

The Englewood Cliffs Board avers that the ALJ's finding on page 29 of the initial decision that genuine educational reasons exist for seeking severance "puts the lie" to Englewood's tactic to project racial motivation to the Cliffs Board and parents, a tactic which it argues is not grounded in law but in public relations and political machination and which is designed to distract the Commissioner from Englewood's old pattern of neglect and decline of Dwight Morrow High School (DMHS). It contends, *inter alia,* that the "genuine educational reasons" it has for seeking a new sending-receiving relationship with Tenafly include a litany of serious educational deficiencies which affluent Englewood could have and should have prevented. The Cliffs Board states that no one disputes New Jersey's laudable public policy against racial discrimination and segregation but it maintains that that policy is not implicated in this case. Rather, it argues, what is involved is "the most significant educational decision a district can make," namely, where its students will be educated. (*Cranbury, supra,* at p. 10)

The Cliffs Board indicates that it takes few exceptions to the ALJ's thoughtful and considered factual findings but it strenuously objects to his conclusions that significant negative impact on racial imbalance was proven and that educational quality at DMHS was impacted because of "symbolic loss." As to this, the Cliffs Board avows that such findings and conclusions are unsupportable in

precedent and in law and are grounded in a well-meaning but unwarranted invocation of strong public policy against racial discrimination, averring that "sadly, after such a careful decision, [the ALJ] fell prey to Englewood's shrilly asserted distraction." (Cliffs Board's Primary Exceptions, at p. 5)

The Cliffs Board further argues that Englewood should not be held harmless from the inferior educational environment it presided over when the petition was filed. It asserts that notwithstanding the Johnny-come-lately improvement effectuated after the arrival of Mr. Segall as principal at DMHS, many serious problems continue referring to the listing recited by the ALJ on page 17 of the initial decision; the testimony of Englewood's former Board President about unacceptable student behavior, poor student attendance, incidents of vandalism and confrontations and fights among students (6/15 T-72-74, 117-119); and Englewood's "own damning confession of its own failures" in a document comparable to one of Tenafly's referred to by the ALJ on page 18 of the initial decision wherein that district acknowledges that morale appears to be suffering at Tenafly High School (THS). The Englewood document (P-236) refers to the past decade as a period of real and perceived decline which resulted in widespread loss of confidence in public school education and a history of administrative changes leading to instability and other concerns regarding such things as continuity in management leadership, long-term goals, morale and adversarial labor relations.

The Cliffs Board goes on to argue that to deny severance is tantamount to rewarding Englewood for deficiencies and unwillingness to tackle problems and, worse, it "consigns those few Cliffs students who are unable to make alternative provisions to a school whose failures are manifest but over which their parents can assert no control to effect improvements." (at p. 9) Of this it states:

Appendix D

> ***It is one thing to expect a community which has failed to ensure excellence in its education, despite having the resources to do so, to live with its failures. It is quite another thing, however, to keep indentured to such failures a community, such as Englewood Cliffs, which has no responsibility for those failures, no say in the system, no ability to effect improvements. Yet that is just the effect of the Initial Decision's recommendations here. (Cliffs Board's Primary Exceptions, at p. 9)

The Cliffs Board asserts that the facts found in the initial decision do not warrant a conclusion, that withdrawal of the Cliffs students would result in substantial negative impact on DMHS. More specifically, it argues that a decrease of only 1.6% in the proportion of white students at DMHS is neither negative nor substantial and that the ALJ's decision that educational quality at DMHS would suffer "symbolic loss" is wrong and, in any event, falls far short of the "definite and tangible" negative impact required in this matter.

While the Cliffs Board fully supports the ALJ's rejection of Englewood Board's "secondary loss" argument advanced by Dr. Jacobs as to impact on racial imbalance, it contends that by finding a loss of 15 students or a 1.6% drop in the proportion of white students at DMHS would cause significant negative impact, the ALJ made a subjective finding going beyond witnesses and not supported by fact. As to this, the Cliffs Board avers that the ALJ should have carried his analysis further by pointing out that 12 of the 15 white students are seniors; therefore, the "real impact" is only 8 students of whom only 3 are white. (R-234; Cliffs Board's

Appendix D

Brief (Pb), at pp. 58-59) The Cliffs Board questions if it is reasonable to find that the loss of 3 white students in 1988-89 would have a significant negative impact on racial balance and contends that unless a speculative "symbolic loss" is considered, there cannot be a "material loss" with so few students. As to this, it argues that:

> Carrying Judge Springer's holding to its logical absurdity (a process he employed to discredit the secondary withdrawal projection, *supra* at pp. 11-12), the Commissioner could *never* grant severance from the worst receiving districts if the districts did not have the same precise racial balance so that there would not be an increase in the nonwhite population (or a decrease in the white population) upon severance no matter how few students were attending the receiving school from the sending district. After all, in 1965 when the sending-receiving relationship between Englewood and Englewood Cliffs began, the racial composition of DMHS was probably between 62.2% and 73.3% white (Pb5), and yet the Cliffs public school population's racial composition as late as 1971 was 96.8% white, P/CR-1, p. 48 (Table 8). Since there would likely always be a larger proportion of minority students at DMHS than in Englewood Cliffs, no matter how few Cliffs students attend DMHS there will always be an impact, albeit small, on the racial balance of DMHS if any Cliffs students withdrew. In such a context, the Cliffs' community would be inextricably

> bound in perpetuity no matter how great the failings of DMHS and no matter how consistently Cliffs students abandon public education. Such a result flies in the face of State Board policy. (emphasis in text) (Cliffs Board's Primary Exceptions, at pp. 15-16)

As to the issue of educational impact, the Cliffs Board takes strong exception to the ALJ's acceptance of Dr. Fine's study to support negative impact on education quality based on "symbolic loss" as opposed to "traditional concrete indicia of educational quality such as reductions in force or curtailment of curriculum." (*Id.*, at p. 16) It criticizes her study for such things as lack of randomness, small number of students, lack of precision as to what was said and the bias of students who knew the purpose of the study and the goal of the litigation. Moreover, it decries that on page 35 of the initial decision, the ALJ considers her study impressionistic evidence with respect to the quantification of any secondary loss in enrollment and 8 pages later this "impressionistic" study has become an "excellent study" much as on page 35 of the initial decision the principal's testimony with respect to secondary loss was deemed "purely subjective impressions" and yet at page 70 it has become "the informed opinion" of an "experienced school administrator." Further, the Cliffs Board argues that if Dr. Jacobs' testimony on secondary loss was dismissed, so must the principal's informed opinion.

The Cliffs Board reiterates its argument that the circumstances in this matter differ from *Jenkins, supra,* because withdrawal of the small number of Cliffs students will cause only a minimal difference in racial balance at DMHS. It also contends, *inter alia,* that the ALJ ignored the facts elicited at the hearing

when he determines that the loss of the Cliffs students would have a much greater negative impact on educational quality than their number alone would suggest because they include a disproportionately large number of upper income and high-achieving students who motivate and set an example for economically deprived and lower-achieving students. (Initial Decision, at pp. 44, 70) In support of this, it points to the DMHS principal's testimony that even if every Cliffs student left that school, there would not be a significant impact on the number of students oriented toward academic achievement and that of the 20 acceptances to "Most Competitive" colleges received by the class of 1987, only one was a Cliffs student.

B. ENGLEWOOD

As may be expected, the Englewood Board urges that the initial decision be affirmed by the Commissioner and has submitted exceptions, a large portion of which it acknowledges "attempt to demonstrate additional reasons that support [the ALJ's] decision and, more particularly, that the impact of severance would be more pernicious than even Judge Springer's opinion reflects." (Englewood's Exceptions, at p. 3)

Initially, the Englewood Board avers that the Cliffs community's attitude toward DMHS has been tainted by racial prejudice and that many of its perceptions are misperceptions; therefore, it argues that allowing severance would be to give state sanction to improper racial attitudes and misperceptions and urges that severance should be denied for this additional reason. It also argues, *inter alia,* that this case does not turn on whether the Cliffs Board's request for severance was "in good faith," and that the issues in the matter are negative racial and educational impact with the ALJ's denial of severance well supported by his findings on

these issues. Moreover, it avers that there is a lot more to the petition for severance than the reasons offered by the ALJ as to why the Cliffs Board might legitimately prefer another high school, contending that where taint of prejudice and misperception burdens a severance request, it is not wiped clean by the possible existence of "genuine educational reasons."

Next, while the Englewood Board strongly agrees with the ALJ's finding that severance would have a substantial negative impact on racial composition, it does except to the finding insofar as it alleges that the impact will be even greater than that determined by Judge Springer. In support of this contention, it avers that the ALJ's approach to the issue had too narrow a focus in that it failed to take into account any secondary loss of Englewood students or any rebound of Cliffs students after the litigation is over. It maintains that even the "undoubted" secondary loss of "some amount" conceded by the ALJ on page 37 would constitute a substantial negative impact in itself where white and Asian students are so precariously short.

As to the ALJ's rejection of the secondary loss proofs, the Englewood Board argues that one does not need to quantify loss with "scientific exactness" any more than it would be necessary to quantify damages with precision once harm has been demonstrated. It also contends that Fleischer's and Segall's testimony should not be discounted when considering impact on racial balance. Further, the Englewood Board urges that the New Brunswick data should not be brushed aside as unsupportive of the secondary loss argument, pointing out that the ALJ found the circumstances in the instant matter distinguishable essentially because of its affluence. As to this, it avers that its affluence is precisely why white flight might occur. If white flight occurred in a district with relatively low socioeconomic levels, it will surely

happen in this case where parents can afford to send their children to private or parochial schools if severance is granted. It believes, that the New Brunswick experience confirms the testimony of Jacobs, Fleischer, Segall, Evans, Leverett and Fine and strongly contends that a substantial loss of its own white and Asian students would follow the loss of Cliffs students if severance were granted.

The Englewood Board also argues that the Cliffs Board's enrollment numbers are not right and that it is playing games with the cohort numbers. It urges that the substantiality of negative racial composition must be evaluated in the context of a school already precariously short of white and Asian students and that, even with the Cliffs students graduating, this does not mean that the 1988-89 cohort will be only 8. It likewise argues that severance should not be based on figures artificially depressed by litigation and the Cliffs Board's campaign for effectuating a withdrawal from DMHS but should be decided on the reasonable probability of rebound if severance were denied.

As to impact on educational quality, the Englewood Board strongly supports the ALJ's finding that severance would have a substantial negative impact and excepts to that determination only insofar as it believes that the negative impact will be even greater than Judge Springer found. Much of its arguments supportive of this contention reiterates the secondary loss position that declining enrollment would be exacerbated by the loss of its own white and Asian students. It also decries what it calls a "vicious and unjust" attack on Dr. Fine's study by the Cliffs Board which, it states, is the same attack launched before the ALJ through lengthy cross-examination and briefs which the ALJ rejected, judging her testimony as credible. Moreover, the Board avers that Mr. Segall's testimony is not contrary to the ALJ's decision on the loss of high-achieving students and points out that in the response referred to by

the Board (5/11T105), Mr. Segall said that insofar as "raw numbers" of Cliffs students withdrawing was concerned, there would be no impact on the number of students at DMHS who are achievement-oriented. According to the Board, however, this does not detract from the fact that Cliffs students are disproportionately upper income and high-achieving students who serve in important peer leadership roles. (High rates of extracurricular participation and enrollment in honors and advanced placement courses) (Initial Decision, at p. 44; 5/1T32-33; R-7 at p. 10)

The Englewood Board rebuts the Cliffs Board's assertion that the ALJ did not address traditional, concrete indicia of educational quality by contending that "the stigma of inferiority associated with school systems," (Initial Decision, at p. 43), has been a "traditional" indicium of educational quality at least since *Brown, supra,* and that such indicium was traditional and concrete enough to support the landmark U.S. Supreme Court ruling that "[s]eparate educational facilities are inherently unequal." The Cliffs Board, on the other hand, argues that DMHS is not segregated but, as frequently pointed out by the Englewood Board and its experts, it is ethnically and racially diverse.

In addition, the Englewood Board argues that the loss of high-achieving students (Initial Decision, at p. 70), has also been a traditional and concrete indicium of educational quality — at least since *Jenkins, supra,* when our Supreme Court confirmed the power to order regionalization of school districts to prevent negative impact that included

> ***withdrawal of a significant number of educationally highly-motivated, capable students, [which was] likely to have an adverse effect upon the performance and motivation of the remaining Town students. (58 *N.J.* at 490)

Appendix D

The following passage serves well to summarize the Englewood Board's rebuttal of the Cliffs Board's assertions with respect to impact on educational quality:

> That the loss of Cliffs students would "deprive DMHS of a disproportionately large number of high-achieving students," I.D. 70, is directly supported by Judge Springer's finding, not excepted to by the Cliffs Board, that "the Cliffs contingent represents a disproportionately large number of upper income and high-achieving students who help to motivate and set an example for economically deprived and lower-achieving students." I.D. 44. *See also* R-171 (Cliffs students constitute a disproportionately high percentage of the pool of students taking advanced placement courses at DMHS); 5/21T78-18 to 80-17 (Segall) and R-178 (Cliffs students fill formal and informal leadership roles). That such a loss impacts negatively on the quality of education for the remaining students was recognized by our Supreme Court in *Jenkins,* 58 N.J. at 490, and is supported by the testimony of Mr. Segall, 5/21T61-6 to 63-10, and Dr. Fleischer. 8/5T123-19 to 124-7. *See* page 3, n.5, *supra*, as to the erroneous argument that DMHS can attract more white Englewood students by raising its educational standards.
> (Englewood Board's Reply Exceptions, at pp. 16-17)

Moreover, Englewood states that:

Appendix D

***although boards of education can reallocate resources to preserve particular courses, the ability of a public school board to maintain a full program in times of declining enrollments is not limitless. 7/28T192-21 to 193-19 and 7/29T118-22 to 119-12, 124-7 to 126-18 (Evans) (that is a "utopian situation");[20] *cf.* I.D. 38 (threats to program from declining enrollments is the major reason why Tenafly has been accepting private tuition students). Although the Englewood Board cannot predict which specific courses would be eliminated after severance and its impacts, *cf.* I.D. 43, it can predict that the loss of high-achieving, college bound Cliffs students, I.D. 44, would lead to losses of some college preparatory honors and AP courses. 7/28T192-4 to 193-19 (Evans); 5/11T25-5 to 26-7 (Segall); *cf.* I.D. 38 (declining enrollment hits hardest small classes such as A.P. classes).

Cliffs students constituted a disproportionate 32.8% of all students taking A.P. courses at DMHS in 1984-85, and approximately 22% of such students in each of the two succeeding years. R-171. Even Dr. Gallia, the Cliffs Board's impact witness, testified that withdrawal of Cliffs students from DMHS would have had impacts as follows: substantial impact on A.P. Chemistry in 1985-86 (2 out of 6 enrollees were Cliffs students) (3/23T56-3 to

20. As Judge Springer concluded, Englewood already provides "strong financial support" for its schools, spending more per pupil than does Tenafly. I.D. 44.

56-8); substantial impact on A.P. Spanish Literature in 1986-87 (3 out of 6 enrollees were Cliffs students) (3/23T69-9 to 70-5); and some impact on A.P. Biology in 1985-86 (10 of 30 enrollees were Cliffs students) (3/19T141-12 to 141-16). Mr. Segall, Dwight Morrow's Principal, testified that, if all Cliffs students had been withdrawn from DMHS before this current school year (1987-88), DMHS would have lost one A.P. course and a rigorous honors physics course, and all other A.P. courses would have been singletons, creating scheduling problems for students. 5/20T171-13 to 171-19.[21] Significant shrinkage of the pool of students available to fill A.P. and honors courses, leading to a loss of some courses', would be a real and definite, not speculative, impact of severance.[22] Secondary loss of Englewood college-bound students would exacerbate the negative impact.***" (Englewood Board's Primary Exceptions, at pp. 31-34)

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21. Dr. Smoley's impact analysis should be rejected as fundamentally flawed, because he assumed "that the Cliffs students are evenly distributed among courses and sections at DMHS," I.D. 40. As the numbers above demonstrate, Cliffs students are not so distributed. They are heavily concentrated in college-preparatory, A.P. and honors courses. *See* I.D. 39, 44.

22. It may be "speculative to hazard any guess as to *which* specific courses might be affected" by severance, I.D. 43; emphasis added; but it is *not* speculative to say that there will be a substantial impact on the DMHS program. *See* Rib 59-62.

Appendix D

C. COMMISSIONER'S DECISION

Upon an extensive and exhaustive review of the record in this matter, the Commissioner is in full agreement with the ALJ's recommendation to deny severance of the sending-receiving relationship between Englewood Cliffs Board and the City of Englewood Board. He finds the ALJ's analysis of the facts, issues and voluminous evidence and testimony exceptionally well-developed and well-reasoned; his legal analysis thorough and cogent; and his findings and conclusions amply supported by the record as discussed below.

Having thoroughly reviewed the Englewood Cliffs Board's position in this matter, the Commissioner rejects its argument that the State's policy against racial segregation is not implicated in this matter. While the Englewood Cliffs Board has put forth a series of educational reasons for wishing to sever its sending-receiving relationship with the Englewood Board, it is naive to suggest that racial considerations are not implicated given the demonstrable "white flight" from DMHS that has occurred since the late 1970's, particularly in light of its own expert's comments that the Englewood Board has long since exceeded the tipping point of 20-30% black enrollment which is believed to be the catalyst for white departure from a school (Dr. London 10/1 T 88-89, 106). However, what is key in this matter is that even when positive educational benefits may accrue from granting withdrawal in a sending-receiving relationship, those benefits can be *outweighed* by serious and compelling reasons such as racial imbalance for that issue is of utmost importance to the State. *Branchburg, supra*

It is clearly established in law that the Commissioner has a heavy responsibility to vigorously and aggressively combat threats to racial balance in our schools. The message of the New Jersey

Appendix D

Supreme Court is quite evident in *Booker, supra,* that the Commissioner must not be misled by unduly restrictive views as to the scope of his own functions in reviewing and supervising local board of education actions and as to his own responsibility in the correction of substantial racial imbalance which may be educationally harmful even though a school has not reached the point of being all or nearly all black (at 181). That he has responsibility to combat "flight" from a racially imbalanced school is likewise clear in that decision when the Supreme Court states that "trends towards withdrawal from the school community by members of the majority must be viewed and combatted" (at 180). It is likewise clear from the *Booker* decision, that even when segregation is not *de jure* but *de facto,* action must be taken to safeguard New Jersey's strong State policy against segregation/ imbalance in the public schools. That DMHS has a serious racial imbalance problem is obvious from the record with white enrollment being barely 12% in 1987-88. Thus, any local board action jeopardizing a racial balance which is already precarious must be scrupulously examined by the Commissioner in order that the State's interests are appropriately guarded.

Having carefully examined the record on the issue of racial balance, the Commissioner fully concurs with the ALJ's finding and determination that severance of the sending-receiving relationship between the Englewood Cliffs Board and the City of Englewood Board would have a significant negative impact on racial balance notwithstanding the small number of white students from Cliffs in attendance due to the unfortunate trend of the Cliffs parents to withdraw their children from the Cliffs resident enrollment to avoid placement at DMHS. As small as that number of students is, their withdrawal would in fact have a substantial negative impact for although the loss of 15 white Cliffs students would lessen the overall white percentage of students from 11.8 to

10.6%, that loss would reduce the number of white students by 16% (15/94) presently at DMHS and in 1990-1991 the percentage decrease would be approximately 25%. (Initial Decision, at p. 37) This determination is in no way deemed contrary to the *Morris School District v. Harding* decision for in that decision the change in racial composition, was found not to be significant because it increased by less than 1% the black enrollment of 16%. This slight increase was deemed acceptable under the circumstances because the Commissioner therein determined that:

> The total withdrawal of Harding Township pupils from Morristown High School would *increase the proportion of black pupils enrolled in Morristown High School by less than one Percent. While in no way disregarding the Psychological importance of such an increase, the Commissioner concludes that such an increase is not sufficient to cause a disproportionate change in the racial composition of Morristown High School. This is particularly so in view of the anticipated population growth in predominately white Morris Township with its far greater geographic area available for further development. This growth may be reasonably expected to decrease the percentage of black pupils enrolled in Morristown High School in future Years, regardless of the decision herein.* (emphasis supplied) (1974 *S.L.D.* at 485)

As can be seen, the circumstances in the instant matter are dramatically different in that serious racial imbalance already exists with 88% of the DMHS enrollment being minority students.

Appendix D

Moreover, no anticipated growth in the number of white students is projected within the confines of the City of Englewood as was anticipated in Morris Township to offset the impact on racial composition.

As to the Cliffs Board's argument that the ALJ did not carry his analysis far enough in that after graduation in June 1988 only 3 white students from Cliffs will remain at DMHS, the Commissioner is in agreement with the Englewood Board that the Cliffs Board is playing a numbers game. The figure it advances is grossly misleading and subject to misinterpretation. Assessing impact on racial composition is not measured simply by subtracting the current seniors and then basing one's conclusions on the Cliffs students remaining. There is a need to look at projected enrollments *for a period of years to come* just as was done by the ALJ who as it happens accepted projected enrollment figures of the Cliffs expert witness, Dr. Tomei, over the vigorous objections of the Englewood Board which sought to use Dr. Jacobs' seven year cohort survival projections rather than Tomei's figures which were based on only three years of enrollment.

Upon careful examination of the arguments, the Commissioner agrees with the ALJ's use of the enrollment projections presented by Dr. Tomei. Given the circumstances of this matter, projected enrollment figures based on three years of enrollment in the immediate past with its clearly established pattern of non-enrollment of Cliffs students are determined to be a more realistic and accurate assessment of enrollment in the immediate future at DMHS than Dr. Jacobs' figures based on cohort survival ratios which are derived from seven years of data and which are dependent upon secondary loss projections and expectations of rebounding. The ALJ's reliance on enrollment figures based on the survival method is deemed appropriate in

assessing impact of enrollment because it is a statistical technique widely accepted as a means to project future enrollments which rely on strict *quantitative* data. Further, acceptance of the enrollment figures offered by the ALJ which comport more closely to the requirements for assessing severance impact in withdrawals from regionalized districts, *N.J.A.C.* 6:3-3.1, is deemed appropriate when faced with conflicting enrollment projections.

Accordingly, the findings and conclusions of the ALJ with respect to significant negative impact on racial composition having been demonstrated are adopted.

Given the arguments presented in this matter and another recent withdrawal application, *Absecon Bd. of Ed. v. Pleasantville Bd. of Ed.*, decided June 1, 1988, the Commissioner is at this juncture compelled to put to rest once and for all the belief that because painfully few white students remain in a school due to a pattern of withdrawal by members of the majority of the school community *(Booker, supra),* there can be no significant negative impact on racial composition. Thus, not just the few remaining will be considered but the pool of eligible students as well who have withdrawn for whatever reason be it to private school, parochial school or, in this particular case, to a public high school in another community as well. If the State were to limit its consideration to 3 students as the Cliffs Board would have us do, it would be for all intents and purposes rewarding, not combating the withdrawal that has occurred. *Booker, supra* If such were to be allowed, the sending district would merely have to wait until enrollment is so devastatingly low that it could then argue that because so few students attend the receiving district, withdrawal can't possibly make a difference. This cannot be permitted.

In 1978-79 approximately 60% of Englewood Cliffs' students

attended DMHS. In the intervening years obvious and dramatic decline in enrollment of Cliffs students at that school has occurred for reasons which, given the circumstances of this matter, must be attributed in large part to what is known in the field to be "white flight." For the Commissioner at this juncture to grant severance to the Englewood-Englewood Cliffs sending-receiving relationship as a matter of public policy would place an imprimatur of acceptance by the State to this flight.

As to impact on educational quality, there can be no contradiction to the ALJ's conclusion that substantial negative impact will result from the withdrawal of even so few Cliffs students as remain at DMHS. One need look no further than the United States Supreme Court decision in *Brown v. Topeka, supra,* to support the ALJ's reliance upon evidence dealing not only with "material loss", *i.e.*, reduction in course offering, effect on curriculum, loss of teaching staff, but also an assessment of impact on the psychosocial dimension of education referred to in this case as "symbolic loss." Notwithstanding the fact that DMHS is not all minority, it is, as previously stated, substantially imbalanced racially; thus, the following passage from the U.S. Supreme Court in *Brown* has no less bearing in this matter than if DMHS were all minority. It states:

> Segregation *** in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the

> educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. (at 494)

As noted by our own Supreme Court in *Booker, supra,* the fact that a school is not segregated by official policy does not preclude state action to eliminate de facto segregation, nor does a school have to be 100% or nearly all minority before acting as may be seen by the following passages:

> Whether or not the federal constitution compels action to eliminate or reduce *de facto* segregation in the public schools, it does not preclude such action by state school authorities in furtherance of state law and state educational policies. See *Morean v. Bd. of Ed. Town of Montclair,* 42 *N.J.* 237, 242-244 (1964); *Addabbo v. Donovan, supra,* 256 *N.Y.S.* 2*d*, at pp. 182-184; *cf. Schults v. Bd. of Ed. of Township of Teaneck,* 86 *N.J. Super.* 29 (App. Div. 1964), aff'd 45 *N.J.* 2 (1965). In a society such as ours, it is not enough that the 3R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-

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* As correctly noted by the ALJ: New Jersey regulations incorporate the undisputed benefits of diversity as one of the state educational goals of a thorough and efficient education. *N.J.A.C.* 6:8-2.1(b)6 declares that, among other goals, the public schools shall help every student in the State "[t]o acquire the understanding of and the ability to form responsible relations with a wide range of other people including, but not limited to, those with social and cultural characteristics different from his or her own."

racial and multi-cultural communities and the earlier they do so the better.[*] It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by. It is heartening to note that, without awaiting further Supreme Court pronouncements, some states, including our own, have taken significant legislative or administrative steps towards the elimination or reduction of *de facto* segregation.*** (at 170-171)

In one additional respect the Commissioner, along with the State Board in sustaining his pertinent determinations, has taken a position which we deem too restrictive. While he has broadly recognized and acted on the principle

that *de facto* segregation has an undesirable effect upon attitudes related to successful learning and denies equal educational opportunities to the racial minority, he has narrowly confined relief to situations where the schools in question were entirely or almost entirely Negro. This may be contrasted with *Vetere* where the Commissioner ordered the desegregation of a school with 75 per cent Negro pupil population, with *Barksdale* where the court ordered the desegregation of schools with Negro pupil populations appreciably more than 50 per cent but less in substantially varying amounts than 90 per cent, and with the general tenor of our own opinion in *Morean v. Bd. of Ed. of Montclair, supra.* In *Morean* we first noted than an official policy of segregation would not be consistent either with sound legal principles or sound educational policies and then pointed to the fact that racial imbalance, though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools. 42 *N.J.*, at pp. 242-243. While we there made no attempt to define the precise extent of racial imbalance which would require remedial action, we did refer approvingly to *Jackson v. Pasadena City School District, supra,* where the court, after indicating that substantial racial imbalance would call for relief, cautioned that exact apportionment of Negroes among the schools was not required and that consideration must be given to all relevant factors "including the

> practical necessities of governmental operation." 382 P. 2d, at p. 882
>
> (at 178-79)

> ***Before us, the petitioners have not advanced any fixed percentage but have presented the thought that, at some ascertainable point, the Negro population of a school becomes so excessively high, in contrast to the percentage of Negroes in the schools of the same level in the community, that it becomes known as a Negro school with the attendant "sense of stigma and resulting feeling of inferiority" referred to in *Fisher v. Board of Education of the City of Orange, supra.* That point generally may be well above 50 per cent but well below the Commissioner's and State Board's 100 per cent or nearly 100 per cent, as evidenced by the racially imbalanced schools stricken in *Vetere* and *Barksdale.* (at 179-180)

Thus, the Commissioner is in full support of the ALJ's conclusion that even with accepting the lower projected enrollment figures of Dr. Tomei and therefore less dire predictions of "material loss" than those advanced by experts accepting Dr. Jacobs' projections and secondary loss position, it is

> painfully evident that DMHS would suffer substantial negative impact on educational quality if withdrawal were allowed. As more fully developed in the factual findings (Section III, Part D, Subsection 2), withdrawal would

have an unacceptable demoralizing influence on the children remaining at DMHS, would be widely perceived as unequal educational treatment on the basis of race, and would wrongfully deprive DMHS of a disproportionately large number of high-achieving students essential to maintenance of academic excellence. See *Brown v. Board of Education,* 347 *U.S.* 483, 494 (1954) (invalidating the doctrine of "separate but equal" schools because that policy "is usually intepreted (sic) as denoting the inferiority of the [N]egro group" and because "[a] sense of inferiority affects the motivation of a child to learn.")

These losses are concrete, and demonstrable rather than speculative. They are detectable by reputable academic studies, such as the qualitative research performed by Dr. Fine, and are verifiable by the informed opinion of experienced school administrators, like Dr. Fleischer and Mr. Segall. Moreover, they are "definite," in the dictionary sense that they are "marked by the absence of the ambiguous, obscure, doubtful or tentative." *Webster's Unabridged New International Dictionary,* 592 (3rd ed. 1976). Similarly, they are "tangible," in the sense that they are "able to be perceived as materially existent" and are "substantially real." *Webster's* at 2337. (*But see also, Brown*, 347 *U.S.* at 493, holding that even "intangible" losses are relevant and must

> be considered when determining the adverse effects of segregation in the public schools.) Without more, these losses in themselves are enough to justify denial of the Cliffs Board's application. (*I.D.*, at p. 70)

As to the Cliffs Board's arguments criticizing Dr. Fine's study, the Commissioner is unpersuaded that the ALJ erred in relying on her study as evidence supportive of the impact on the psychological and social domains of education at DMJS that state sanctioned withdrawal is likely to precipitate. As correctly argued by the Englewood Board, the criticisms levied against her study were dealt with during her testimony and the ALJ, fully cognizant of these criticisms both during hearing and by way of post-hearing briefs, accepted her testimony as credible and her study as excellent. Having reviewed the record on this issue, the Commissioner agrees.

That Dr. Fine's study was deemed supportive of negative symbolic loss, that is, the stigma, inferiority, and the demoralizing impact withdrawal may provoke, and Dr. Jacob's secondary loss position was not, serves as no basis for rejecting the ALJ's conclusion. Secondary loss refers to an even greater *loss in enrollment* at DMHS by the departure or flight of Englewood Board's own black and Hispanic students if severance is granted, given the message such severance would signal as so vividly revealed in Dr. Fine's study. Thus, enrollment projections are not based solely on the quantitative statistical analysis of cohort survival ratios. Rather, they extend beyond the analysis of strictly quantitative data by predicting *further* or secondary losses based on the psychosocial impact (symbolic losses) severance is likely to have. That the ALJ rejected psychosocial arguments in the area of numerical or quantitative projections as speculative and

impressionistic but accepted them when assessing impact on the quality of education which includes both psychological and social dimensions is deemed to be neither erroneous nor contradictory. In that instance, recognition is given to the impact on students insofar as such things as their feelings, beliefs, perceptions, motivation and social relations are concerned but without extending beyond that to say, "Therefore, X number or percentage of Englewood students at DMHS will be likely to leave that high school."

While some secondary loss would undoubtedly result from severance in this matter (I.D., at p. 37), the degree to which that loss would occur and the subsequent impact it would have on educational programming and staffing simply cannot be quantified with a strong degree of confidence as it is primarily impressionistic in nature, as found by the ALJ. The Commissioner does believe, however, that the dramatic decrease in white enrollments New Brunswick has experienced could reflect a worst scenario picture in this case because, as ,noted by the ALJ, the flight from that district occurred *notwithstanding* relatively low socioeconomic status of the community. However, the Commissioner agrees that, for the purposes of this inquiry, reliance on secondary loss projections and the likelihood of a New Brunswick experience is too speculative and, therefore, inappropriate.

Accordingly, the Commissioner adopts the findings and conclusions of the Administrative Law Judge as cited above, as well as the findings repeated below which so cogently and succinctly capture the essence of the negative impact under review:

> I FIND that severance would have a substantial negative impact on the quality of education at DMHS, much greater than any material loss

caused by the withdrawal of 21 Cliffs students. In effect, any material losses would be greatly magnified by symbolic losses.

Departure of 21 students, in and of itself, would not seriously impair the educational program at DMHS. Reasonable minds may differ as to what size is "ideal" for a high school, but even a small school of under 800 students is capable of sustaining a quality educational program. Since the Englewood Board possesses the prerogative of reallocating resources to preserve particular courses or to implement other educational priorities, it is speculative to hazard any guess as to which specific courses might be affected by the withdrawal of 21 Cliffs students.

However, Dr. Fine's excellent study substantiates that "any material losses pale by comparison with the symbolic losses" which DMHS would suffer if severance were approved. As that comment implies, the sticking point here is not so much the actual loss of a few students, but what that loss would signify. Those left behind at DMHS would perceive the result as an implicit message that the school is not good enough for whites and Asians, but is acceptable for blacks and Hispanics. Feelings of isolation and inferiority engendered by such perceptions would lower the self-confidence of minority youngsters and be detrimental to their trust in the basic fairness

of the educational system. Speaking as a trained psychological observer, Dr. Fine stated that the reaction of black students to this litigation goes beyond mere "disappointment." Black students to whom she spoke uniformly viewed the situation as "betrayal" by the one public institution to which they belonged. Reemergence of the stigma of inferiority associated with segregated school systems would be a regressive development for public education in New Jersey and would have serious repercussions far beyond the immediate parties to this case. Policymakers at the state level must give careful consideration to the negative implications severance would have for future race relations and social cohesiveness, not only at DMHS but also in other schools throughout this state.

To make matters worse, the Cliffs students are not evenly distributed among all socioeconomic groups and ability levels at DMHS. Rather, as Mr. Segall confirmed, the Cliffs contingent represents a disproportionately large number of upper income and high-achieving students who help to motivate and set an example for economically deprived and lower-achieving students. Loss of these particular students, therefore, would have a much greater negative impact on educational quality than their number alone would suggest.

(I.D., at pp. 43-44)

Thus, having conducted an exhaustive review of the record, the Commissioner adopts the recommended decision of the ALJ for the reasons expressed in the initial decision and those stated herein. Any argument advanced by the Cliffs Board that the ALJ's conclusions of law are flawed because he improperly applied the applicable law is rejected. Moreover, the Commissioner rejects the Cliffs Board's arguments that attempt to justify severance because DMHS was an inferior educational facility at the time the petition was filed and should not, therefore, be held harmless from that. It is clear from the record that this case has been heavily immersed in an effort to cast DMHS as an inferior school, not worthy of its students. It is equally clear that the record does not support this position.

While it is clear that DMHS has experienced leadership problems and other problems which have been targeted for improvement, this does not serve to demonstrate that DMHS was at that time inferior. Rather, the record demonstrates that the Englewood Board has sought to identify weaknesses and to take corrective action to improve its programming for a wide diversity of student needs not found in the Tenafly Board's more economically and socially homogeneous student population. That its programs and goals differ from Tenafly's is not a sign of inferiority or inability to provide a more than adequate program for its college-bound student population which is obviously a concern of the Englewood Cliffs Board.

More specifically, the Commissioner finds as misleading the manner in which the Englewood Cliffs Board casts Mrs. Marsan's testimony in this matter by focusing on one aspect of her forthright testimony and omitting the overall sum and substance of it. A reading of that testimony clearly reveals the pride this parent and former Board President has in, and her commitment to, the quality

of education being provided at DMHS which the record demonstrates provides a breadth and scope of programming highly conducive to successful college preparation.

The citing of the Englewood Board's purported "self-confession" in its grant application (P-236) is likewise deemed meritless in building a case of inferiority against DMHS. In the Commissioner's judgment, the record in this matter reveals Englewood to be a district that has been subject to an incredible amount of scrutiny and pressure, both external and internal to the district, over the last several years which few districts in this state have experienced or ever will experience. Moreover, it reveals a district that has taken steps to safeguard the quality of education which should be commended, not maligned.

Given the disposition of this decision denying severance, it is absolutely essential that there be a cooperative effort and true commitment on the Englewood Board's and the Englewood Cliffs Board's part to work together in the best interests of the students for whom they have the responsibility to educate.

II. TENAFLY BOARD'S TUITION POLICY AND INJUNCTION

The Tenafly Board maintains that while it agrees with a number of facts found by the ALJ as they pertain to its policy, it disagrees with others and believes certain others were omitted. It contends the ALJ's legal analysis and application of facts to law are erroneous and that a proper analysis compels a contrary result to his determination with respect to the injunction he issued. It also believes that the ALJ erred in saying that any consideration of what actions may be taken by Englewood and Cliffs parents with regard to their children's education in the event of injunction was

irrelevant. On the contrary, it argues that such actions are relevant because they impact not only on the effect of the tuition policy on both the Englewood Board and the Cliffs Board, but also on the equitable considerations which must be weighed by the Commissioner in determining whether injunctive relief is appropriate and assessing the impact on the continued vitality of public education in New Jersey and the growing trend toward fostering edueational excellence through greater parental involvement and choice.

More specifically, the Tenafly Board urges that the ALJ's determination that its tuition policy is illegal and contrary to public policy is clearly erroneous, factually unsupported and amounts to administrative overruling of duly enacted legislation. It finds the ALJ's condemnation of the policy as repugnant to be astounding in light of *N.J.S.A.* 18A:38-3 enabling districts to do exactly what the Tenafly Board is doing. This is true particularly in light of his express factual findings concerning the manner in which the policy was enacted, its express purpose and the educational market for which it was designed, *i.e.*, students enrolling in private sector, and the fact that it was nondiscriminatory in its administration.

Moreover, the Tenafly Board argues that the initial decision is devoid of any factual findings that the injunctive relief recommended by the ALJ would result in increased attendance at DMHS, averring that an injunction will only result in diverting Cliffs students whose parents are dissatisfied with the quality of education at DMHS to the waiting seats of private and parochial schools. It puts forth 16 factual findings it believes mitigate against granting injunctive relief and which demonstrate the error of finding its policy illegal which are incorporated herein by reference and which it believes present a clear picture that:

Appendix D

> The picture presented by these facts is clear — Tenafly properly adopted its tuition policy, for a valid purpose, to address legitimate needs of the district. It did not act with any improper motive, did not target children of any particular school district, and in fact targeted children who were otherwise inclined to attend area private and/or parochial schools. The policy has not been administered in a discriminatory manner, as a number of minority students have been admitted to Tenafly's schools as tuition students. ***Nowhere in the record are there any facts or evidence which would support a finding that *anything* that was done by Tenafly with respect to its tuition policy was contrary to law. (emphasis in text) (Tenafly Board's Primary Exceptions, at pp. 6-7)

As to erroneous factual findings, the Tenafly Board excepts to its policy being found "unusual" and "novel" (I.D., at pp. 49-53), averring that (1) it is not unlike those in neighboring communities and those introduced in evidence (CR-89; CR-86) and (2) the only thing unusual is that considerably more nonresidents attend Tenafly High School (THS) than other New Jersey public schools. (I.D., at p. 49) It likewise excepts to the ALJ's commentary that typically the tuition policies have been designed to protect the continuity of education by accommodating students into or out of the district during the school year (I.D., at p. 50), contending there is nothing in the record to support this generalization.

The Tenafly Board objects to the ALJ's opinion that the practical effect of its policy is to drain upper income white and Asian college-bound students from DMHS (I.D., at p. 54) and to

lure many of DMHS' most academically talented students (I.D., at p. 71) because it is unsupported by the record, contrary to other factual findings made by the ALJ. It also argues that the evidence proves beyond a doubt that the policy does not attract any students who would have otherwise attended DMHS; rather, the Tenafly Board believes the policy keeps children who would otherwise be lost to the private sector.

The Tenafly Board reiterates that its policy can only be described as being in accordance with the law, pointing to the fact that the purposes of the terms and conditions for attendance are rational and beneficial to the district, the prospective students and public education in general. It strongly excepts to the ALJ's characterization that whites and Asians as a group are better able to afford the "entry fee" (I.D., at p. 53), avowing that any notion charging tuition is illegal or improper must be rejected because there is not factual support for his broad generalization as to the financial capabilities of whites, Asians and Hispanics as a group and there is nothing pernicious about charging tuition since the nonresident students do not contribute otherwise to the Tenafly schools. This, among other things, leads the Tenafly Board to the conclusion that, based on the factual finding and the wording of the statute, there is no illegality in its policy and to rule otherwise is administrative overruling of the statute.

The Tenafly Board asserts that *Shore Regional, supra,* is not supportive of illegality as the underlying facts are distinguishable, namely the accepting of students from *selected* districts; the school was already overcrowded leaving the inference of ulterior/ improper motive; the Tenafly Board's policy serves to increase its black and Hispanic enrollees not to circumvent integration; it does not accept students who, would otherwise attend DMHS. Further, the Tenafly Board argues that the ALJ misconstrues the concept of

the relationship between the public schools and the students which they are to serve vis-a-vis his reference that "92 tuition students at THS *belong* at DMHS." (I.D., at p. 72, emphasis in Exceptions) Citing *Pierce v. Society of Sisters, supra,* and *Meyer v. Nebraska,* 262 *U.S.* 390 (1923), it avers that:

> . . . a child does not *belong* to any particular public school. A child has a right, pursuant to statute, to attend a public school in the district in which he or she resides free of charge, since the resident has already paid for the educational services through property tax dollars. But the school has no legal right to compel the attendance of that child *at that school. Pierce, supra.* The school exists to serve the child, not the other way around. If a parent chooses not to avail himself of this "free" education, the school cannot be heard to complain. It cannot be said that any child, whether attending DMHS, THS or any other school, *belongs* at DMHS. Thus, Judge Springer's admonition is based upon a false premise as to the propriety of any school district asserting what amounts to property rights in a child.
>
> (Tenafly Board's Exceptions, at p. 29)

In addition, the Tenafly Board *maintains* that any contention that its policy only provides choice for those who can afford tuition payments cannot serve as a proper reason to curtail choice. Rather "it should properly be an *invitation* to consider ways to extend choice to those who cannot now easily avail themselves of it." *(Id.)*

Appendix D

The Tenafly Board next turns to a lengthy legal argument that even in the context of *de facto* segregation, extraordinary relief such as enjoining a party from doing that which it is authorized by law to do cannot be granted, absent a showing of discriminatory purpose or intent. It likewise maintains that the ALJ's reliance on *Norwood, supra,* and again *Shore Regional, supra,* was misplaced because in both there was either overt or at least a reasonable suspicion of intent. The Tenafly Board itself supports the principles articulated in these two decisions, *i.e.*, that the State cannot, and should not, support any institution which acts with discriminatory or segregatory intent or improper motive. In support thereof, it cites *Washington v. Davis,* 426 *U.S.* 229 (1976) which held that proof of racially discriminatory intent or purpose is required to show an equal protection violation, along with *Village of Arlington Heights v. Metropolitan Housing Dev't Corp.*, 429 *U.S.* 252 (1977) and a series of education related cases in the vein of *Milliken v. Bradley,* 418 *U.S.* 717 (1974) which disallow remedial action against one district for *de facto* segregation in a neighboring district not intentionally caused by that neighboring district.

Lastly, the Tenafly Board urges that the ALJ failed to properly consider the appropriateness of the injunction, citing numerous instances where he failed to give proper weight to the evidence submitted regarding 10 points summarized below:

1. An injunction is not necessary;
2. An injunction would fail and may well be counterproductive;
3. An injunction would cause Tenafly losses without any corresponding Englewood gains;

4. An injunction would cause Englewood Cliffs to lose a large number of Upper School students;

5. An injunction would destroy choice;

6. An injunction would penalize innocent parties;

7. An injunction and its aftermath would severely diminish the Governor's prestige and be a dangerous precedent;

8. An injunction would violate the rule that boards should not be enjoined when acting within their discretion;

9. An injunction would benefit only private and parochial schools, at the expense of public education;

10. An injunction would reward poor performance and penalize excellence.
(Tenafly Board's Exceptions, at pp. 41-49)

The Englewood Cliffs Board likewise urges reversal of the ALJ's injunction arguing the Tenafly Board's tuition policy has given an alternative to parents who are not sending their children to DMHS, particularly since not a single one at THS would otherwise attend DMHS. It, too, views the ALJ's words to be harsh given that the policy is similar to other public schools in New Jersey. Moreover, the Cliffs Board avers that while it may not be the State's concern whether or not its resident students not going to DMHS continue to avoid it, the enjoining order is flawed if the rationale for it is precisely because they would have otherwise attended that school.

Appendix D

Upon review of the record and weighing the exceptions and replies thereto, the Commissioner is in agreement with the Tenafly Board that the tuition policy itself is not in violation of law. *Shore Regional, supra* at p. 226 Rather, the effect it has created on the racial balance at DMHS is clearly contrary to public policy as determined by the ALJ and cannot be allowed to stand. Although the policy is, on its face, not discriminatory and although it was not adopted for improper motives, this does not mean that . . should be allowed to stand insofar as the Cliffs and Englewood Boards are concerned, for the record has made it abundantly clear that the *effect* of the policy has been exactly what the ALJ denounces, namely, to exacerbate racial imbalance at DMHS by skimming off and luring students who are eligible to attend DMHS. Thus, in that sense it is "repugnant" and a "beggar-thy-neighbor" policy as it affects DMHS. Such a determination by the ALJ is by no means a misconception of the relationship between students and a public school district or *Pierce, supra.* Rather, it is entirely consistent with the *Asbury Park v. Shore Regional* decision which is applicable to the matter herein. That some distinguishing factual circumstances exist between the two is irrelevant because the effect of the two policies is the same, namely, negative impact on racial balance. Moreover, the ALJ is absolutely correct that the situation in the instant matter is far more serious than that found in *Shore Regional* because here we are talking of 92 students not 8. Citing the previously quoted passage from the New Jersey Supreme Court in *Booker, supra,* with respect to combating withdrawal of white students, the Commissioner determined on the basis of 8 students that:

> ***A trend has developed at the Shore Regional High School *which must be thwarted if the determined directions of the Commissioner, the State Board of Education,*

> *the courts of this State and Nation are to be vigorously pursued.* (emphasis supplied)
> (1971 *S.L.D.* at 226)

The Commissioner also spoke to the issue of the public high schools and the intent of *N.J.S.A.* 18A:38-3 in the following text:

> Public high schools in this State are created primarily for the purpose of serving the resident pupil population and those students from *bona fide* sending districts approved by the Commissioner and the State Board of Education. Certainly, the intent of *N.J.S.A.* 18A:38-3, *supra,* is not to provide an avenue permitting individual parents or local boards of education to circumvent the law requiring the integration of the public schools. (*Id.*, at 227)

The above is true even if no purposeful intent on the part of the local board exists to circumvent integregation but where the effect is nonetheless to contribute substantially to racial imbalance in the affected high school. Moreover, the State Board in that decision addressed the primacy of the constitutional and statutorily based policies of this State designed to eliminate racial imbalance in public schools when local board actions under *N.J.S.A.* 18A:38-3 conflict with those policies. It reads:

> Shore Regional further argued that the principles enunciated in *Booker v. Board of Education, Plainfield,* 45 N.J. 161 (Sup. Ct. 1965), relied on by the Commissioner, were not sound bases for determining that the discretion allowed a local board under N.J.S.A. 18A:38-3

> must give way to the constitutionally and statutorily based policies of New Jersey designed to eliminate racial imbalance in public schools. Whatever may have been thought to be the limitations on the applicability of the principles of *Booker* in the face of statutes which might seem to suggest a conflict has been settled by the Supreme Court of New Jersey in the case of *Jenkins v. Township of Morris School District, et al.*, N.J. (Sup. Ct., June 25, 1972) which defined the broad scope of the Commissioner's and the Board's authority in carrying out the educational goals and policies as expressed in our constitution and statutes. N.J.S.A. 18A:38-3 imposes no mandatory course of action on any local board. It allows discretionary action by such a board in certain situations if a board is so inclined to act. We see no conflict whatever between the principles of *Booker* and *Jenkins* as here involved and the provisions of the cited statute; and even if there were, the educational goals and objectives underlying *Booker* and *Jenkins* would have to be given primacy. (*Id.*, at p. 229)

Finally, the Commissioner fully concurs with the ALJ that it is of no moment that Cliffs parents in this matter have no intentions of sending their children to DMHS. Under *Pierce, supra,* they are free to send their children to private or parochial school and that right is in no way infringed upon by this decision. There is no right, however, to use *N.J.S.A.* 18A:38-3 as a mechanism which directly and substantially contributes to racial imbalance at DMHS. A

review of the affidavits of the parents does not reveal anything persuasive to compel modification of the ALJ's determination to enjoin any students not currently enrolled in Tenafly from so enrolling at THS. Unlike the students in *Shore Regional,* who were not allowed to continue at that high school, the enjoining in the instant matter does allow for the continued attendance of certain Englewood and Cliffs students in the Tenafly School District. There is, however, modification to the ALJ's injunctive order being made by the Commissioner as explained below.

The ALJ enjoined Tenafly from accepting any Englewood or Cliffs student in *any* of its schools on a tuition-paying or other basis. He did, however, allow any Englewood or Cliffs student already enrolled in the Tenafly School District to remain in that district through graduation.

This order is modified herein to enjoin Tenafly from accepting into *Tenafly High School* any Englewood or Cliffs student. Students from those districts attending THS on April 18, 1988 may continue there through graduation. The prohibition does not apply to grades lower than grade 9 as those grades are not involved in a sending-receiving relationship between the Cliffs and Englewood Board nor is racial imbalance at that level at issue herein. However, Cliffs and Englewood students so enrolled now or in the future shall not be allowed to attend THS when they reach that level of schooling. One exception to this is granted, however, namely, any Cliffs or Englewood student enrolled in and attending *eighth grade* in Tenafly on April 18, 1988, the date of the initial decision in this matter, may attend THS in September 1988 until graduation therefrom. Englewood or Cliffs eighth graders attending school other than in the Tenafly School District on April 18, 1988 may not attend THS.

Appendix D

It is argued, *inter alia,* in a motion received with respect to Englewood Cliffs eighth grade students who have been *accepted for attendance* at THS this September that those students should be allowed to attend THS because they are "enrolled" there. Contrary to what is argued, those students *were not enrolled* at THS or any other Tenafly school at the time of the ALJ's decision. They were enrolled in and attending the schools where their eighth grade is located. To argue otherwise is meritless. Moreover, as was found by the State Board in *Shore Regional,* the affidavits filed by the parents and the arguments of the Cliffs and Tenafly Boards, there is no demonstration of "any impactive disadvantage or emotional or educational harm that would attach to attendance at the [designated receiving high school]." (at 230) Thus, the relief sought in the motion is denied.

While in no way diminishing either the right of a board of education to enact a tuition policy for attendance of non-resident students in its district under *N.J.S.A.* 18A:38-3 or the right of parents to send their children to schools under such a policy, it must be reemphasized that when there is a conflict between those rights and the constitutionally and statutorily based policies of this State on racial integration, the Commissioner's obligation is to combat racial imbalance. Thus, any rights of the Tenafly Board to have a tuition policy or Cliffs or Englewood parents to avail themselves of that policy must be held subordinate to the compelling State interest to combat racial imbalance. *Shore Regional, supra*

Accordingly, the findings and conclusions of the ALJ, except as modified herein, are adopted by the Commissioner.

III. DUAL SENDING-RECEIVING RELATIONSHIP

The Cliffs and Tenafly Boards are both in agreement that the

best solution to the issues in the instant matter is to permit a dual sending-receiving relationship wherein Cliffs would have both THS and DMHS as its receiving high schools. Each district stresses that Cliffs parents would then have a choice to select the school best meeting the needs of their children and each argues that the ALJ should not dismiss the solution out of hand without consideration of any of the potential benefits.

The Cliffs Board criticizes that the ALJ "unfortunately has confused a consideration relevant to any eventual State determination on interdistrict choice in public schools with the more narrow and immediate issue at hand: what school or schools should be the receiving high schools for Englewood Cliffs." (Cliffs Board's Primary Exceptions, at p. 27)

Because the Cliffs Board was found to have genuine educational reasons for termination and its request is in good faith, it argues that it is

> simply not relevant that Englewood parents would not have a choice of high school; most New Jersey school districts as Englewood, have only one public high school *** and, until the State implements freedom of choice across school district lines, there cannot be a free public high school choice for students in these districts. (*Id.*, at p. 28)

The Cliffs Board sees no invidious distinction in this since Englewood parents have power to affect DMHS through their Board of Education, a power its parents do not enjoy.

The Cliffs Board also alleges that the ALJ did not weigh

sufficiently the evidence as to a student's success in school depending on whether his or her parents "buy into the school's educational goals and missions." *(Id.)* It does concede, however, that in the short term, given the negative perceptions in the community, most parents will favor THS. It states with respect to this:

> ***[T]he Cliffs Board concedes that in the short term, given the negative perceptions in its community of DMHS — in many aspects now validated by the Initial Decision — most parental decisions will favor THS. However, now that educationally based reasons have been conclusively shown to have been generally the basis of parental choice in the Cliffs, it should be obvious that if DMHS is as excellent a school as Englewood contends or, more likely, if DMHS should continue on its self-proclaimed program of improvement, Cliffs parents will opt — for some, perhaps many, children — to return to DMHS. They did so in great numbers in the 1970's — particularly earlier in that decade before the deterioration proven at the hearing had taken hold. There is no evidence — aside from Englewood's paranoid assertions — that racial bias would prevent them from doing so again. (*Id.*, at p. 31)

The Englewood Board strenuously rejects the arguments advanced by the Cliffs and Tenafly Boards, agreeing with the ALJ that such an alternative would be unfair and discriminatory. (I.D., at pp. 77-78) It goes on to state that:

Appendix D

***[A] dual S/R relationship in the circumstances of this case would be identical in result to severance of the S/R relationship with DMHS and establishment of a new S/R relationship with THS. It would be a sham and the Cliffs Board knew it when the proposal was launched long after the Board filed its severance petition. Cliffs white and Asian parents, with their fears and misunderstandings of DMHS, *see* pages 6-12, *supra,* having been told by their own Board of Education for years that DMHS is a dreadful place while THS is a palace of learning, will not choose to attend predominantly minority DMHS over homogeneous white and Asian THS.

The Cliffs Board's president confirmed the point. 1/21T37-9 to 38-18 and 202-3 to 202-13 (Geiger); *cf.* 10/1T133-5 to 136-6, 138-3 to 138-8 and 139-14 to 140-24 (London) (with two schools of equal quality, white parents, with some exceptions, will not voluntarily send their children to the predominantly minority school). Dr. Fleischer concurred. 8/5T125-15 to 127-18 (Cliffs parents would opt for THS and not DMHS, and the result would be equivalent to severance). Because Cliffs parents would not choose DMHS under a dual S/R relationship, that sham remedy would increase segregation at DMHS, contrary to law and constitutional policy. "Choice" should be rejected if it fosters segregation. *See, e.g.*, 8/10T129-6 to 130-22 (Fleischer) (quoting from

Appendix D

Time for Results, the Governors' 1991 Report on Education) (*e.g.*, "... analysts must consider what [the] impact of choice programs will be on racial balance. Policy makers should limit choice among schools so that it does not have a negative impact on racial balance. Choice programs should seek to bring together rather than isolate students from different racial and economic groups.")
(Englewood Board's Primary Exceptions, at pp. 56-57)

Upon careful consideration of the record and the parties' exceptions, the Commissioner is in full agreement with the ALJ's rejection of the dual sending-receiving alternative. Such a relief would certainly serve to legitimize what has been found to be impermissible in this case, namely, the flight of 76 Cliffs students to THS which has contributed to the serious racial imbalance at DMHS. The establishment of a dual sending-receiving relationship would in essence give legal/State sanction to such flight which must be combated not facilitated. Just as severance of a sending-receiving relationship will not be permitted if substantial negative impact results, neither shall a dual sending-receiving relationship be approved when substantial negative impact results. Allowing Cliffs parents to select between THS and DMHS would only serve to exacerbate on existing serious racial imbalance at DMHS and would impact on educational quality in the same manner as severance.

Further, the Cliffs Board is wrong in its assertion that the flight of Cliffs students has been exonerated because educational reasons for severance were found to have been advanced by the Cliffs Board. As previously stated, no one could seriously believe that

racial prejudice and circumvention of integration is not at play in this case. Thus, the Commissioner again emphasizes that even if legitimate educational reasons are advanced for severance or the establishment of a dual sending-receiving relationship, neither will be granted where compelling reasons, such as substantial negative impact on racial composition and educational quality, as herein, outweigh the educational benefits sought by the sending district in a new relationship with another district. While finding that educational reasons existed for the Cliffs Board's request for severance in this matter, such acknowledgment does not detract from the ALJ's determination and the Commissioner's affirmance that DMHS provides a broad, comprehensive educational program which is both thorough and efficient and capable of providing more than adequate preparation for post-secondary education.

IV. REGIONALIZATION

The Englewood Board strenuously objects to the ALJ's failure to order regionalization and argues that at the very least a regionalization study should be ordered. It disagrees that the "single community" characteristic of the *Jenkins, supra*, case (Morristown-Morris Township) is "a sine qua non to application of the principle that district lines may be crossed to avoid segregation in fact" and urges that if that concept is instructive at all, its focus should be on educational ties between communities. (Englewood Board's Primary Exceptions, at p. 38) It then goes on to point out each of the ALJ's findings which support this contention, leading the Board to urge that the educational ties, when coupled with the "shared geography and history" (I.D., at p. 59) of the communities, satisfy whatever "single community" characteristic is applicable to the matter herein.

The Englewood Board asserts that although the ALJ

mentioned socioeconomic differences between the communities, he failed to note that these differences are analogous to the differences between Morristown and Morris Township in *Jenkins;* thus, the Board argues that the socioeconomic factors favor regionalization as they reflect the potential for diversification.

The Englewood Board also excepts to the ALJ's cost benefit analysis of regionalization and contends that the substantial long-term benefits identified in pages 60-61 of the initial decision warrant regionalization or at least an order requiring a regionalization study, since that option should not be rejected without a full study. Further, the Board avers that, even on the record as it stands now, the advantages of regionalization far outweigh any disadvantages, urging that:

> ***the ALJ rejected regionalization for essentially three reasons.
>
> (1) because one cannot be sure that a regional school will be better than DMHS and THS, I.D. 62, sec. 1 and 65;
>
> (2) because the change to a regional school may meet with resistance and would require resources that could be better spent improving THS and DMHS, I.D. 65; and
>
> (3) because a diverse student body will present challenges to educators at a regional school. I.D. 62, secs. 3, 4.
>
> Rejection of regionalization for these reasons would be contrary to our state's public policy, and, in part, contrary to the evidence.
>
> (Englewood Board's Primary Exceptions, at p. 41)

The Englewood Board offers a rebuttal of each of these reasons as well as a series of six other points of rebuttal (*Id.*, at pp. 41-47) to support its contention that the ALJ's determination on regionalization should be rejected or modified. The focus of the rebuttal centers on such issues as the State's policy on integration, the ability of the three districts to plan a high quality program which expands academic and cocurricular offerings, and the positive benefits of diversity.

Upon review of the record and careful weighing of the arguments put forth in the parties' exceptions and replies, the Commissioner is in agreement, with the ALJ that compulsory regionalization should not be ordered in this matter. Forced regionalization is an extraordinary relief that will be ordered only when the factual circumstances demonstrate that (1) "a single community" exists between (or among) the districts in question; (2) regionalization is "entirely reasonable, feasible, and workable"; and (3) regionalization can be accomplished "without any practical upheavals." *Jenkins, supra* at 505 The Englewood Board has failed in these proofs and its arguments to the contrary are deemed meritless. Any purported "incompleteness." in the record rests solely with the Englewood Board as cross-petitioner seeking such relief.

The ALJ's factual and legal findings are adopted by the Commissioner. Accordingly, the Englewood Board's motion seeking forced regionalization is dismissed. Further, the Commissioner sees no compelling basis to order a regionalization study. After 99 days of hearing, tens of thousands of pages of transcripts and hundreds upon hundreds of pieces of evidence resulting from the microscopic scrutiny the schools in this case have undergone, the Commissioner determines that any further study would be inappropriate because the record herein is more

than sufficiently developed to support the ALJ's conclusion that regionalization is not warranted.

V. SUMMARY

Based on the significant negative impact on racial composition and educational quality that would result if the sending-receiving relationship between the Cliffs Board and the City of Englewood Board were allowed to be severed, the petition for termination filed by the Cliffs Board is hereby DENIED. Also DENIED is its request to establish a dual sending-receiving relationship with the Tenafly Board as this would likewise create significant negative impact on racial balance and educational quality.

It is further ordered that the Tenafly Board of Education cease and desist from admitting to its high school on a tuition or other basis any students who are residents of either Englewood or Englewood Cliffs. While the tuition policy on its face is not illegal, the effect under the circumstances of this matter is to exacerbate the precarious racial imbalance at DMHS; thus, the strong State policy against discrimination and segregation must have primacy over any discretionary power granted to a board by *N.J.S.A.* 18A:38-3. ***Shore Regional, supra*** The injunction does not apply to resident students from those districts who were enrolled in *and* attending either THS or eighth grade in the Tenafly School District on the date of the initial decision in this matter, April 18, 1988. Nor does it apply to any grade level other than that currently or in the future served by THS except that no Englewood or Englewood Cliffs resident student so attending Tenafly in a grade lower than those of its high school shall be allowed to attend THS when he/she reaches that level of schooling. This ruling fully disposes of the issues raised in the Cliffs Board's Motion for Interim Relief

submitted on behalf of eighth grade students who were accepted for admission to Tenafly High School for the 1988-89 academic year.

Moreover, the Englewood Board's cross-petition for forced regionalization is DENIED for failure to demonstrate circumstances comparable to those in the State Supreme Court's decision in *Jenkins, supra.*

s/ Saul Cooperman
COMMISSIONER OF EDUCATION

JULY 11, 1988
DATE OF MAILING - *JULY 12, 1988*

APPENDIX E — DECISION OF THE HONORABLE KENNETH L. SPRINGER, ADMINISTRATIVE LAW JUDGE, DATED APRIL 18, 1988

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1086-86
AGENCY DKT. NO. 426-12/85

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner/Cross-Respondent,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent/Cross-Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Cross-Respondent.

John J. Degnan, Esq. & Stephanie C. Rosen, Esq.
(Shanley & Fisher, attorneys)
for petitioner/cross-respondent

Arnold K. Mytelka, Esq. & Agnes I. Rymer, Esq.
(Clapp & Eisenberg, attorneys)

Appendix E

and Paul L. Tractenberg, Esq.
co-counsel for respondent/cross-petitioner

James S. Rothschild Jr., Esq. & Glenn D. Curving, Esq.
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)
for cross-respondent

Record Closed : December 31 ,1987 Decided : April 18, 1988

BEFORE KEN R. SPRINGER, ALJ:

I. Statement of the Case

This case started as an application by a public school district for authorization from the Commissioner of Education ("Commissioner") to terminate its existing sending-receiving relationship with the high school of one neighboring district and enter into a new relationship with a rival third district willing to accept its students. Enrollments of the sending district's students at the receiving school have declined steadily over the last decade or so. Basically, the sending district alleges that deficiencies in the quality of education offered at the receiving school constitute good cause for the proposed change. Opposed to this application, the receiving district denies the charge of inadequate educational quality. Instead, the receiving district contends that the real motive behind the application is racial prejudice, characterized by reluctance on the part of parents in a largely white and upper income community to send their children to a predominantly black and Hispanic high school.

Apart from the sending district's actual intent, the receiving district complains that the foreseeable impact of terminating the existing relationship would be a substantial worsening of the racial

imbalance already present at its high school. Central to the dispute is differing expert opinion about the occurrence of any "secondary" loss of the receiving district's resident students if the relationship is terminated. Although the receiving district anticipates that a large proportion of its own white, Asian and middle class black and Hispanic families would also abandon the local high school if the sending district left, the sending district challenges such projections as speculative and unfounded.

In addition to its defense, the receiving district has filed a cross-petition seeking injunctive relief to prevent the rival district from accepting the sending district's students on a tuition-paying basis, claiming that the practice deprives it of much-needed revenue and undermines racial integration in the public system. It decries what it calls the use of private school admission procedures by one public school entity to the detriment of another. Further, the receiving district predicts a sizeable "rebound"of sending district students to its high school if the rival option were to become unavailable. On the other hand, the sending district contends that its students would go elsewhere rather than return to the receiving school. For its part, the rival district maintains it is merely pursuing a creative solution to its own problems of declining enrollment, and that competition for excellence among public districts promotes greater choice for parents and students.

Alternatively, the receiving district asks the Commissioner to cure whatever educational deficiencies or racial imbalance may exist in each individual district by forming a new regional high school district comprised of all three. In its view, offsetting strengths and weaknesses in the constituent districts could yield improved programming, ethnic diversity and greater educational opportunity for all. Moreover, the receiving district claims that the rival district has taken the first step toward consolidation by

attracting large numbers of tuition-paying students who would otherwise attend the receiving school. Both the sending and rival districts resist this suggestion. They argue that the only historical precedent for a forced merger imposed by the Commissioner involved separate districts sharing a "single community," which circumstance is said to be distinguishable from this case.

At least four major issues are raised by this complex litigation: first, determination of whether the case is governed by the new or old version of *N.J.S.A.* 18A:38-13, the statute requiring the Commissioner's approval before an existing sending-receiving relationship may be terminated[1]; second, application of the appropriate legal standard for termination of a sending-receiving relationship to the particular facts; third, the authority and grounds for issuance of any order enjoining the rival district from accepting certain out-of-district students on a tuition-paying basis; and, fourth, the appropriateness of the exercise by the Commissioner of his acknowledged power to order involuntary regionalization to correct racial imbalance.

As the record has developed, the case implicates hard choices among important and occasionally competing state policy objectives, including social justice, academic excellence, freedom of choice and home rule. No easy answers exist which are entirely satisfactory or likely to reconcile the legitimate interests of all parties. What this initial decision sets out to accomplish is to organize the relevant facts, outline the advantages and disadvantages of various options and make specific recommendations to policymakers in the field of education.

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1. After filing of the petition but prior to commencement of any hearings, the Legislature amended the statutory language. L.1986, c. 156 (effective Nov. 24, 1986).

Appendix E

Actually, resolution of the factual dispute in this litigation is much simpler than any of the parties have portrayed it. The outcome ultimately rests on the clear illegality of the Tenafly Board's private tuition policy as a matter of law and public policy. Essentially, this decision rejects the Englewood Board's attempted quantification of "secondary" loss as purely speculative. It also rejects both sides' version of the "rebound" analysis on the ground that such issue is legally irrelevant. Finally, the crux of the case, the impropriety of the Tenafly Board's actions and the irrelevancy of any rebound analysis, will be dealt with in the section on private tuition (Section III, Part E) and in the legal conclusions (Section IV).

II. Procedural History

On December 23, 1985, petitioner Englewood Cliffs Board of Education ("Cliffs Board") filed its petition with the Commissioner.[2] Respondent Englewood Board of Education ("Englewood Board") filed its answer on January 21, 1986, along with a cross-petition joining the Tenafly Board of Education ("Tenafly Board") as a cross-respondent. Tenafly Board filed its answer to the cross-petition on February 11, 1986. Subsequently, on February 19, 1986, the Commissioner transmitted the consolidated matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

OAL conducted four prehearing conferences between April 9

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2. "Cliffs" refers to the Englewood Cliffs municipality. "Cliffs Board" refers to the Englewood Cliffs Board of Education. "Cliffs district" refers to the public school district of Englewood Cliffs. "Cliffs students" refer to students residing in Englewood Cliffs. Corresponding designations are used for Englewood ("Englewood") and Tenafly ("Tenafly").

and October 16, 1986. Prior to any hearings, the parties engaged in extensive discovery, including inspection of each other's high school facilities by teams of experts and depositions of expert witnesses. Thereafter, OAL held 99 days of hearings commencing on January 7, 1987 and ending on October 6, 1987. These hearings generated a massive record consisting of some 19,800 pages of transcript and 630 exhibits separately marked for identification. Judge and counsel made an unannounced site visit to the two high schools on February 27, 1987. The parties submitted their respective briefs on December 11, 1987. Upon receipt of the parties' reply briefs, the record closed on December 31, 1987. Time for preparation of the initial decision has been extended to April 18, 1988. An appendix to this decision contains a list of witnesses and exhibits.

III. Findings of Fact

A. Background Characteristics of the Three Communities

Geographically, Englewood, Cliffs and Tenafly are located adjacent to each other on the eastern edge of Bergen County, within easy commuting distance from New York City. Englewood is the largest in physical size, roughly five square miles, followed by Tenafly, nearly four and a half square miles, and Cliffs, just under two square miles. In terms of population, Englewood is also the biggest, with a count of 23,701 in the 1980 Census, almost twice as large as Tenafly, with 13,552, and four times as large as Cliffs, with 5,698. Cliffs and Tenafly are suburban communities, while Englewood may best be described as urban.

All three are affluent communities, relative to others in the same county and state. Illustratively, the Planner's Data Book for Bergen County shows average gross income per homeowner

reported on 1984 state tax returns as $82,436 for Englewood, $94,992 for Cliffs and $103,833 for Tenafly, compared to $53,912 for Bergen County and $43,346 for all of New Jersey. Relative to each other, however, the households of Cliffs and Tenafly have much higher income levels than those of Englewood. Median per capita household income in 1979 reflects this relationship, with Englewood at $21,052, Cliffs at $37, 269 and Tenafly at $33,774, putting all but Englewood in excess of the county total of $24,056. A study prepared by the planning firm of Candeub, Fleissig & Associates for the Tenafly Board indicates that in 1980 Englewood had "substantially more households earning less than $10,000" than did Cliffs or Tenafly. At the other end of the scale, Cliffs and Tenafly had "twice the percentage of households with incomes of $35,000 or more." By other indicia of wealth or social status, Cliffs and Tenafly also come out ahead of Englewood, although all three considerably surpass most communities. More Cliffs and Tenafly than Englewood residents have completed high school, and more are employed in professional, technical or managerial occupations.

In terms of racial composition, Cliffs and Tenafly are much less diverse than Englewood. Latest census data reveal that, in round numbers, the white school-aged population (ages 5 to 17) of Cliffs is 84% and of Tenafly is 88%, as opposed to a white school-aged population in Englewood of 37%. Corresponding figures for the black population are substantially less than 1% each for Cliffs and Tenafly, in comparison to 48% for Englewood. Hispanics constitute almost 4% of the Cliffs and Tenafly school-aged populations, compared to 11% for Englewood. Both Cliffs and Tenafly have sizeable and growing Asian populations, constituting nearly 12% of the Cliffs and 7% of the Tenafly school-aged population. Over the decade ending in 1980, the Asian population in the Tenafly community at large increased more than sevenfold.

Appendix E

Economically, the Asian minority as a whole is nearly as prosperous as the white majority and, in some areas, such as value of housing, even better off. Thus, the Asian component, while clearly different ethnically and culturally from the white majority, is not disadvantaged in any financial sense.

The Cliffs district seeks to dissolve its existing sending-receiving relationship with the Englewood district and to substitute a new relationship to be formed with the Tenafly district. Governed by an elected school board, the Cliffs K-to-8 district is too small to support its own local high school. It operates two elementary schools, one for kindergarten through grade three and another for grades four through eight. Graduates must go outside the district for high school, either to the designated receiving school, currently Dwight Morrow High School ("DMHS") in Englewood, or to some other school at the family's own expense. As of September 30, 1987, the Cliffs district enrolled 486 students. Of that total, more than half (51%) are white and a large proportion (42%) are Asian. Combined black and Hispanic enrollment amounts to only 7%.

The Englewood district, which has an appointed school board, operates two elementary schools, one middle school, and the previously mentioned high school, DMHS, for grades nine through twelve.[3] Total district enrollment on September 30, 1987 was 2,411, including 799 students attending DMHS. At DMHS, the

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3. Starting next year (1988-89), the Englewood Board plans to house its resident eighth grade students in a portion of the facilities, now occupied exclusively by DMHS. One result of this relocation will be a restructuring of students at the high school level into an eighth and ninth grade group and a tenth and eleventh grade group. Despite the presence of the eighth graders at the high school, Englewood school officials envision that the high school program will remain "based on a 9 through 12 arrangement with the same curriculum."

vast majority of students are black (66%) or Hispanic (18%), together comprising roughly 84% of the student body. Whites are underrepresented. Present white enrollment at DMHS (12%) is disproportionately low compared to the number of school-aged whites (37%) living in Englewood at the time of the census, suggesting that DMHS is experiencing difficulty drawing white students from within the Englewood community itself.[4] Asians, on the other hand, represent a slightly higher proportion (4%) of the DMHS student body than their incidence in the school-aged population (3%) in the census.

Like the Cliffs district, the Tenafly district serves a predominantly white and Asian population. It too has an elected school board, which oversees a system consisting of four elementary schools, a middle school and a four-year high school. Under a long-standing arrangement, Tenafly High School ("THS") is the receiving school for high school students from Alpine, a wealthy community bordering on Tenafly's northeast corner. Additionally, the Tenafly district attracts large numbers of out-of-district students who pay tuition in order to attend. Inclusive of nonresident students, the entire Tenafly district enrolled 2,325 students on September 30, 1987. There were 891 students at THS alone, composed mainly of whites (80%) and Asians (18%), with a smattering of blacks (1%) and Hispanics (1%). In contrast to the disparity found at DMHS, the breakdown at THS more closely mirrors the racial distribution in the host community.

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4. Plausible explanations exist for this phenomenon, including the presence of a considerable Orthodox Jewish population who prefer parochial education and a large number of well-to-do households with a family tradition of private schooling. Whatever the reason, the fact remains that DMHS would be much better integrated if more whites from within the district chose to attend the public school system.

Appendix E

B. Historical Overview

The instant litigation is the culmination of an unfortunate deterioration in cordial relations between the Cliffs and Englewood districts which occurred gradually over many years. More than 22 years ago, on October 4, 1965, the two districts voluntarily entered into a contractual agreement, whereby the parties undertook to share expanded high school facilities in Englewood for a minimum of ten years, subject to existing law which, then as now, required approval of the Commissioner before a sending-receiving relationship could be terminated. In the beginning, both participants must have considered the arrangement mutually advantageous, since the Englewood Board promised to "construct additional high school facilities and expend monies for this purpose," while the Cliffs Board obligated itself to send a certain percentage of its freshmen class every year through 1976.

During the intervening years, at least since 1977, attendance of Cliffs students at DMHS has dropped dramatically, at a much faster rate than the general decline in school-aged population. Throughout most of the 1970s, the number of Cliffs ninth graders entering DMHS hovered in the vicinity of 60% of the graduating eighth grade class. Thereafter, this number fell markedly from a high of 69% in the 1980-81 school year to a low of 4.4% in the current 1987-88 year. Today, the actual number of Cliffs students enrolled at DMHS has dwindled to 21, equal to 2.6% of total DMHS enrollment of 799 students.

Attempts by the Cliffs Board to reverse this trend have not met with notable success. Conscious efforts by board members to say positive things about DMHS, publication of favorable items in a monthly newsletter, and sponsorship of "cottage parties" to sell

Appendix E

Cliffs residents on the value of DMHS have had little or no effect. The Englewood Board criticizes the Cliffs school administration for not doing enough to encourage attendance at DMHS and for undermining its status by providing instructions to parents on how to apply for admission to THS.

Concern about the enrollment situation dates back to 1978, when the Cliffs Board commissioned a study of community attitudes by a team of researchers under the leadership of Professor Francis Ianni of Columbia Teachers College. In a report issued in early 1979, the authors of the Ianni study concluded that dissatisfaction in the lower grades centered on class size and atmosphere, shifted in the middle grades to academic preparation and, at the high school level, focused on "social characteristics, primarily 'racial balance' and 'discipline.' " However, the researchers also found educational standards at the high school to be "an important issue," particularly for parents who, for economic reasons, are "unable to send their children to non-public schools." Prophetically, the 1979 Ianni study predicted that nonuse of the public school system by Cliffs residents "seems destined to increase rather than decrease" and that this inclination was likely to worsen "with grade level."

Ample opportunity exists for many Cliffs students to go elsewhere because of their parents' ability to afford tuition payments and the availability of numerous private and parochial alternatives in the immediate metropolitan area (a chart in evidence depicts more than 20 nearby nonpublic secondary schools). Dr. Harold France, former school superintendent of the Cliffs district, recalled that the student drain began as early as sixth or seventh grade because of parents anxious to reserve a future place for their child in selective private high schools.

Appendix E

In the late 1970s, a series of articles appeared in newspapers circulating in Bergen County which emphasized negative aspects of DMHS and tended to put that school in an unfavorable light. Adverse publicity generated by such newspaper accounts contributed to the growing public perception that DMHS had serious problems which, in turn, aggravated the declining enrollment of Cliffs students at DMHS. Meanwhile, deep-seated discontent with DMHS found expression in the political debate for local elective office in the Cliffs community. It is true that the topic never became a partisan issue, since all candidates were in favor of terminating the existing relationship. Campaign literature for recent borough council and school board elections indicates, however, that various factions vied against each other in proclaiming opposition to ties with DMHS. Ultimately, the slate most strongly committed to severance, headed by current Cliffs Board president Carin Geiger, won control of the school board and voted, on September 23, 1985, to institute this litigation.[5] Cliffs Board made initial overtures in October 1985 about the possibility of establishing a new sending-receiving relationship with the Tenafly district. For reasons of its own, the Tenafly Board was receptive to the idea. Faced with declining enrollment, the Tenafly

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5. This is not the first time that the Cliffs Board has attempted to withdraw from its sending-receiving relationship with DMHS. Previously, in March 1977, the Cliffs Board filed a petition with the Commissioner, which, as amended in January 1978, alleged that the ten-year contract between the districts had expired and also that it should be free to choose a new receiving district to assure a "thorough and efficient education" for its students. The Commissioner never had occasion to make any final determination of these contentions. Instead, the petition was eventually dismissed for lack of prosecution, and the Commissioner subsequently denied Cliffs Board's request for reinstatement of the suit. *In re Application of Englewood Cliffs Bd. of Educ.*, No. 91-80 (Comm'r Nov. 13, 1980). Since no disposition was reached on the merits, Cliffs Board is not precluded from litigating identical or similar issues in the present cause of action.

Board saw affiliation with Cliffs as a way to avoid cutbacks in teaching staff, to stabilize class size so as to make scheduling easier and to provide additional revenues to the district. Within a few days of each other in November 1985, the Cliffs and Tenafly Boards adopted complementary resolutions authorizing entry into the new relationship, conditioned on receipt of the necessary approval of the Commissioner.

Each side attributes the sharp drop in Cliffs enrollment at DMHS to different underlying causes.[6] Interestingly, both share the common assumption that, in the Englewood Board's words, "parents want the best education for their children," or, as the Cliffs Board expresses the same idea, "parental perceptions of [educational] quality drive their decisions on where they will send their children." From the Englewood Board's viewpoint, the root cause of the decline is fear and racial bigotry, fueled by false rumors, misconceptions about actual conditions at DMHS, and passions aroused by this very litigation. In support of this thesis, the Englewood Board offered the compelling testimony of a highly articulate recent DMHS graduate who vividly told of her Cliffs classmates' widespread use of derogatory racial terms and gave anecdotal instances of stereotypical images which colored some of her classmates' thinking (for example, the irrational and totally unjustified fear that a female student might be "attacked, raped, mugged or who knows what" if she went to DMHS).

From the Cliffs Board's perspective, the exodus of Cliffs students is triggered by the belief held by many parents that the quality of education at DMHS has been deteriorating. Typical of this outlook were the feelings voiced by Wolfgang Reich, prior

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6. Although the Cliffs and Tenafly Boards do not have identical interests, their positions coincide on this as well as on most other important points.

Cliffs board member and father of four, who poignantly described the dilemma between his personal commitment to the concept of public education and his unhappiness with current conditions at DMHS. Reich, whose family had moved into the Cliffs community because of the fine reputation of its school system, had been pleased with the education received by his oldest daughter, had some reservations about the experience of his second daughter and was dissatisfied with the experience of his third daughter, then a senior at DMHS. Specifically, Reich felt that his third daughter had been exposed to "ostracism" and "polarization" along racial lines, which had the temporary effect of causing her to hate going to school. Reluctantly, he has decided that, unless conditions at DMHS change for the better, he will not put his youngest daughter through the same "heart-wrenching experience."

Undoubtedly, the truth lies somewhere between these extremes. Some individuals in the Cliffs community may well be motivated entirely by baser instincts and dislike of people different from themselves. Others may be motivated solely by a desire to do what is best for their children. Fortunately, the applicable legal standard does not depend on probing the human heart to ascertain the subjective intent of individuals. Consequently, our attention must turn to the proofs on the quality of education.

C. Educational Reasons for Termination of the Existing Relationship

Much of the exhaustive record is devoted to expert proofs about the quality of education at DMHS and THS. As counsel for the Englewood Board has observed, DMHS and, to a lesser degree, THS were put through a "microscopic" examination which few, if any, other schools in this state have ever endured. Inevitably, the comparison degenerated, at times, to an overly simplistic argument

over which school is "better" than the other. At the outset, it should be clearly stated that both DMHS and THS are good at what they do, although each concentrates on a different type of student and follows its own distinctive educational approach. Englewood district has passed Level I monitoring by state officials, the highest stage, and hence is fully certified as satisfying state standards for a thorough and efficient education.

Research by Weber, Brookover, Corcoran and others suggest that powerful outside influences on academic performance, such as socioeconomic status and parental involvement, can be partially counteracted by characteristics identified as common to effective schools. These characteristics include strong administrative leadership, especially at the building principal level; high expectations for academic achievement; a safe and orderly school environment; commonly held goals and beliefs; frequent assessment of student progress; emphasis on basic skill acquisition; and high rates of time-on-task activities by teachers and students. With varying success, both Englewood and Tenafly districts attempt to incorporate the lessons learned from effective schools research into their educational programs. Experts produced by both sides used the criteria derived from effective schools research as one way of determining educational excellence. Several of the experts also followed the general model of looking at "inputs or resources" allocated to the educational system and at "output measures" for ascertaining accomplishments, although, of course, they expressed contrary opinions on the merits of the dispute.

Perhaps the most striking difference between the two districts is in school climate and culture. While both offer well-rounded college preparatory programs, DMHS has a much greater emphasis on improving basic skills, maintaining discipline and

increasing attendance, areas taken more for granted at THS. Illustratively, Dr. Smoley, the Tenafly Board's educational consultant, commented that the 1985-86 goals and objectives for the Englewood district focus on improving scores for secondary students in the bottom quartile on standardized reading and mathematics tests, whereas corresponding goals and objectives for the Tenafly district relate to higher achievement in advanced placement chemistry. Summarizing the main distinction, Dr. Smoley indicated that DMHS directs more attention to special and vocational education than does THS, which concentrates more on accelerated or enriched courses. In Smoley's view, these differing goals and objectives represent appropriate responses to differing needs in the two districts. Along similar lines, Englewood Board's curriculum expert, Dr. Alma Evans, testified that both schools cater to the needs of college-bound students, but that THS, unlike DMHS, has those needs as its primary purpose. In other words, DMHS has a broader and more comprehensive program and THS a narrower and more specialized one.

Another major difference in atmosphere between the two schools is the importance attached to strict enforcement of proper student behavior. When Richard Segall, a respected and dynamic educator, assumed the duties of principal of DMHS in September 1986, he took immediate steps to make it more difficult for students to cut classes, to put students in required study halls and to restrict access to portions of the campus during the school day. In contrast, THS has an innovative policy, known as "individual decision time," which gives qualified students considerable freedom to travel about the school building during unscheduled periods and manage the use of their own free time. Dr. Daniel Knueppel, the highly capable assistant superintendent of the Tenafly district who originated the concept, reported that returning graduates have praised the learning experience as helping to instill

a sense of personal responsibility and the self-discipline expected of students in college. The point here is not that more or less control over student conduct is necessarily the correct pedological technique, but rather that two school administrations have embarked on separate courses of action to meet what each regards as the unique needs of its own student body.

Considerable controversy surrounds the accuracy of certain statistics collected by the Englewood district and the validity of comparisons to similar statistics for other districts. To substantiate its contention that DMHS suffers from serious discipline problems, the Cliffs Board introduced an analysis of attendance figures, dropout rates, suspension and expulsion rates, and reports of visits to the school by police or fire departments. A study prepared by Educational Administration Associates ("EAA"), a group of educational consultants retained by the Cliffs Board, noted that in 1985-86 the DMHS average daily attendance rate was 88.57%, far short of its own goal of 95% and placing it at the very bottom of the rankings of 45 Bergen County high schools. Attendance at DMHS improved to 90.8% by 1986-87, but even that is five percentage points below the 95.9% figure for THS. Meaningful comparison of dropout rates is difficult, due to deficiencies in recordkeeping by DMHS staff and changes in reporting requirements. Such data as are available suggest that the dropout rate at DMHS went as high as 20% in 1985-86, a figure the Englewood Board insists is inflated. Given the benefit of the doubt, DMHS's dropout rate of 7.78% in 1986-87 (69 students out of a total enrollment of 887) is still disturbingly high, contrasted to the county dropout rate for grades 9 to 12, which in recent years has ranged between 2 and 3%. Analysis of suspension rates is complicated by the fact that local districts have different policies about what offenses deserve suspension and whether in-school or out-of-school suspension should be imposed. Nonetheless, the

number of out-of-school suspensions at DMHS reached a maximum of 272 in 1981-82 and remained as high as 243 in 1985-86. Out-of-school suspensions decreased to a more acceptable 158 in 1986-87, when principal Segall adopted a sensible policy of supervised detention so disruptive students could continue to receive some benefits of education. Regardless of the exact magnitude of the discipline problem, the Englewood Board clearly recognizes its past deficiencies in this area and is seeking to correct them. DMHS had five disciplinarians on its staff in 1986-87, one for every 117 students.

The record fails to provide support for what some Cliffs parents apparently fear most, that their children will be in risk of physical harm if they attend DMHS. Of course, there was reference to the normal juvenile incidents of name-calling, shoving and pushing on stairways or in corridors, and what might be called hazing of underclassmen by seniors. But even these events were described through hearsay evidence rather than direct testimony of the alleged victims. Compared to other schools, DMHS does indeed have a history of an unusually large number of police and fire department involvements. Police made 32 visits to DMHS in 1984 alone, mostly for trespassing or disorderly conduct complaints but also for assault, drug or weapons investigations. By 1986 the number of police visits had declined to 14, presumably in part because of Segall's new policy of handling trespassing incidents internally without notifying the police. Fire department responses to DMHS totalled 24 in 1985, 17 in 1986 and similarly high numbers in earlier years. Nearly all involved false or malfunctioning alarms, fires outside the buildings or incidents occurring after regular school hours, so there was little actual exposure of students to injury.

One piece of testimony hard to accept at face value is Mr.

Appendix E

Segall's assertion that he was unaware of any significant drug use by students on the DMHS campus; but the record is devoid of contrary evidence to prove him wrong. No substance abuse incidents at DMHS were reported in 1985 or 1986. Between September 1986 and early May 1987, DMHS took no disciplinary action against any student for drug use or distribution. THS, by comparison, reported three incidents of marijuana or cocaine use in 1985-86 and admitted concealing the true extent of drug abuse incidents in 1984-85 (the actual number of incidents that year was 18). This could mean either a more serious drug problem at THS, or simply greater vigilance by Tenafly school officials.

In view of the importance of strong leadership to successful operation of an effective school, the EAA study was extremely critical of the high rate of administrative turnover experienced in the Englewood school system in general and at DMHS in particular. Over the last eighteen years, the Englewood district has had eight permanent or acting superintendents and six different high school principals. Of greatest concern has been administrative instability at DMHS, where three individuals have held the position of principal since 1980. Segments of the Englewood community, including Barbara Marson, former school board president, accused Segall's immediate predecessor of having "lost control of the school." When this past principal came under consideration for tenure in April 1986, Englewood Board failed to renew her contract. Tenafly district too has experienced administrative turnover problems, not the least of which was the abrupt departure of Mr. Wilson, THS's principal, prior to completion of the 1986-87 school year. Both districts also have relatively new superintendents, Larry Leverett having come to the Englewood district in March 1986 and Dr. Gerald DeGrow having joined the Tenafly district in August of the same year. None of the witnesses challenged the impressive qualifications or obvious

competence of Richard Segall, DMHS's incumbent principal. Lack of administrative stability at DMHS continues, however, as demonstrated by the fact that one of two assistant principals just left for another district and the other was recentlydenied tenure.

Professor Edward White, the school management expert responsible for coordinating the work of the EAA team, acknowledged that the DMHS teaching staff possesses appropriate certification and has adequate training and experience. On the basis of only limited observations, EAA did not attempt to evaluate classroom performance of individual teachers. Broadly speaking, it can be said that THS teachers have a slight edge over their DMHS counterparts both in years of experience and in attainment of a master's degree or above. (See the report prepared by the consulting firm of Cresap, McCormick & Paget for the Tenafly Board.) Longevity of teaching staff is not an unqualified blessing, since new blood is also healthy for a school district. But the most salient difference between the two staffs is racial composition, an item which can be influential in developing positive role models for black and white children alike. In this area, THS is sorely deficient. Except for one Hispanic and one Asian teacher, THS's teaching staff of 87 was virtually all white in 1986-87. That same year, DMHS's teaching staff of 94 was 61% white, 32% black and 6% Hispanic or Asian.

Staff development at DMHS has been criticized by EAA and internally by Englewood school employees for inadequate consultation with teachers in the planning of programs, insufficient funding and lack of consistency. In May 1984, a curriculum director for the Englewood system expressed his reservation that one promising training program should not be allowed to become just another "soon to be forgotten . . . gimmick." A recent survey (the Kettering School Climate Profile),

undertaken by Mr. Segall to learn the attitudes of his teachers, discloses widespread unhappiness with the current in-service training programs available at DMHS. This same survey shows that teacher morale at DMHS is low in some areas, such as involvement in the decision-making process and satisfaction with the physical working environment. Superintendent Leverett has made staff development a high priority, and there are some aspects of the DMHS program which THS cannot match, such as participation in the state-sponsored Academy for Teaching and Management and a contractual provision for reimbursement of graduate course tuition. Morale at THS also appears to be suffering, as noted in a grant application which describes teachers as feeling that they lack input on decisions affecting them and do not receive recognition for their efforts.

Insofar as curriculum is concerned, DMHS and THS offer a common core of similar academic subjects, at least as set forth on paper in their respective curriculum guides and course descriptions. Both provide a wide range of courses for students of different ability levels and interests, including advanced placement, honors and enriched courses. Class size tends to be lower at DMHS, less than 20 students per class, while THS often has more than 20 in a class. Graduation requirements are practically identical, except that DMHS requires 110 credits and THS 115 credits. Also, DMHS requires one more year of mathematics in order to graduate than the state minimum.[7]

EAA witnesses detailed numerous shortcomings in the

7. For 1987 graduates, DMHS required three years of mathematics, while the state minimum was only two years. Beginning with 1988 graduates, DMHS will require four years of mathematics. Regulations raising the state minimum to three years of mathematics do not take effect until the ninth grade class of September 1990. *N.J.A.C.* 6:8-7.1(c)1i(2).

DMHS curricula and instructional program, including the Englewood Board's unwillingness to appropriate money requested by Mr. Segall for acquisition of needed computer equipment; failure to incorporate existing computer capacity into a "traditional" and "broad range[d]" mathematics and science program; deficiencies in the variety and challenge of the social studies curriculum content; an industrial arts program which insufficiently addresses the expanded role of technology; and a music program unable to induce a sufficiently high level of student participation. Principal Segall, Dr. Evans and others pointed out many good things about the DMHS curricula, among which are a strong English department of exceptional scope and depth, a cable television station operating on the school premises, greater opportunity for exchange of different outlooks because of the racial and economic diversity of the students, and an extensive career education program with a work experience component.[8]

Important differences in emphasis between the two districts are equally evident in other aspects of the total educational program. For example, Dr. Shirley Cohen, a recognized expert in the field of special education, praised DMHS for offering a broad "continuum" of special education services extending from "remedial and preventive programs" to separate "self-contained classes" designed expressly for students with specific types of handicapping conditions. THS makes an effort "to serve students with special needs without classifying them," an approach disparaged by Dr. Cohen but nonetheless consistent with recent proposals in New Jersey to avoid unnecessary labeling and focus

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8. Dr. Smoley conceded that the industrial arts Program at DMHS was more "substantial" than that offered by THS. Although THS's industrial offerings are limited, the district does make arrangements to send students with specific vocational plans to the Bergen County Technical Education Center for half a day in addition to their academic program in Tenafly.

instead on instructional needs.[9] Children with learning difficulties are tutored in a resource room setting by a certified teacher of the handicapped or receive remedial instruction in so-called "essentials" courses. Since THS lacks a full-spectrum special education program of its own, students in need of more intensive services must be sent outside the district to regional consortiums, other public schools, or private placements.

Similarly, the two schools follow different philosophies regarding delivery of guidance services. DMHS offers a wider range of services to its students beyond the usual orientation and college or career counseling, including such other services as crisis intervention, group counseling and peer tutoring. Although THS has a more conventional guidance program emphasizing college admissions, Dr. Smoley commented that Tenafly guidance counselors are more "proactive," reaching out to provide assistance rather than waiting for students to come for help. Whether one or the other school has a higher student-counselor ratio depends on how the counseling function is defined. DMHS has a greater number of full-time equivalents on staff. But because DMHS counselors divide their time among varied duties, THS has a smaller caseload per counselor.

Library facilities are an item to which the Tenafly district clearly assigns a much higher priority than the Englewood district. THS houses an attractive, brightly lit "media center," well-stocked with an up-to-date collection of 28,000 books, audiovisual equipment and language lab. On a visit while school was in session, Dr. Thomas Gallia, an EAA associate, observed the center in use by "numerous" students. By comparison, the "clean and

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9. See the pilot project known as *The Plan To Revise Special Education in New Jersey* (Jan. 1986).

organized" library facilities at DMHS, located in separate buildings, contain a smaller collection totaling about 16,000 volumes. In a random review of the science literature, Dr. Gallia discovered that much of the material was outdated or obsolete. Only a handful of students used the library at one time, numbering no more than 33 in one six-hour day as recorded on sign-in sheets. Acknowledging that the DMHS libraries had been underfunded and underutilized, Segall testified about steps taken to improve the situation, including longer library hours and a 300% increase in the amount budgeted for printed materials.

Both DMHS and THS offer a wide array of co-curricular activities, including athletic teams, honor societies, debating and public affairs clubs, dramatic and musical productions, and school publications. Cliffs students attending DMHS actively participate in these activities, and a fair number presently hold leadership positions, such as captains of the girls' tennis and basketball teams. In fact, the degree of participation by Cliffs students in co-curricular activities at DMHS exceeds that of their Cliffs peers at THS. In 1986 a white student from Cliffs was selected prom queen at DMHS. In 1985-86, another white Cliffs student was captain of the otherwise all-black varsity wrestling team, whose members were chosen on the basis of ability. Despite allegations that white students at DMHS are made to feel "unwelcome" in afterschool activities, two recent Cliffs graduates testified that they never encountered any difficulties in being accepted and never were excluded from social activities. One jarring exception, especially for a public high school dedicated to improved understanding between races, is the existence of an officially-sanctioned activity known as "Inner Pride," which had never admitted a white member until this litigation began. Described as an exclusively male "fraternity-like organization," Inner Pride was founded years ago "to foster character, academic achievement and service to the

school." Although its written charter does not expressly restrict membership to persons of any one race, the first and only white member was admitted early last year. A newer and less established DMHS organization for female students, known as "Positive Image," does not have any white members at all.

Appearance and condition of the physical facilities occupied by the two schools are distinctly different. Older and more in need of repairs, DMHS consists of two structures, the North Building built in 1931 and a detached extension, Martin Luther King Hall, added in 1967. These two buildings sit majestically on a beautifully landscaped and wooded 34-acre campus, also shared by the Englewood Middle School. On the exterior, the North Building has an exceptionally attractive Gothic facade reminiscent of the architecture of Princeton University. Inside, however, the antiquated North Building leaves an impression which George Johns, an architect specializing in school facilities, described as a "drab" environment. Newer and more contemporary in design, King Hall appears "colder and sterile" and has in the past been the object of "more vandalism and graffiti." At one point, the North Building was in such state of disrepair that the authors of the district's 1979 Master Plan for Educational Facilities recommended consideration of abandoning the building altogether. However, in 1981 the Englewood Board embarked on an ambitious renovation project, which has cost 1.45 million dollars and entailed installation of a new central heating system, replacement or repair of windows and roofs, rehabilitation of locker rooms, and improvements to the King Hall auditorium. Moreover, the Englewood district has approved a long-term capital plan envisioning further expenditures of 2.08 million dollars at the high school over the five-year period 1987through 1991.

Expert witnesses gave conflicting testimony about alleged

safety hazards and code violations said to exist at DMHS. Back in 1985, an inspection team from the Education Department's Bureau of Facility Planning Services had visited the DMHS site and reponted over twenty deficiencies of varying degrees of seriousness from "chained and locked" exit doors to "crumbly plaster" in a couple of classrooms. More recently, in September 1986, EAA's facilities expert, Dr. Mario Tomei, conducted a repeat inspection and saw what he claimed were innumerable continuing deficiencies from "graffiti" and "inoperable toilets" to "damaged lockers" and "chained doors." Architect Johns inspected the DMHS premises in October 1986 and he too purportedly discovered many substandard or unsafe conditions, including improper door hardware, worn stair treads, boiler plant violations and inadequate "segmenting" of the structure to contain the spread of fire. In response, Kenneth Albert, a licensed professional engineer, answered each of the charges point by point, either denying the existence of the alleged deficiency or explaining measures employed to rectify the problem. Significantly, neither local nor state officials responsible for enforcement of construction and fire safety codes have cited DMHS for any violations of law.[10] For purposes of this proceeding, therefore, DMHS must be deemed in substantial compliance with all applicable building standards.

Situated on a 28-acre tract alongside a stream, THS is a modern, well-maintained facility completed in 1972. Hallways and classrooms are colorful and pleasantly decorated. THS projects a different image from DMHS, one that is bright, cheerful, and conducive to its function as a place for learning. THS

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10. The 1985 inspection by state officials from the Department of Education was performed at the request of the Englewood district and did not result in any enforcement action against DMHS.

possesses many highly desirable features, including its outstanding media center, well-equipped science and computer laboratories, student-teacher conference rooms and a television studio.

As to "output measures," DMHS students, in the aggregate, score consistently lower than THS and other Bergen County high school students on standardized tests. One such test is the High School Proficiency Test (HSPT), a criterion-referenced instrument developed under the auspices of the New Jersey Department of Education as a measure of reading, mathematics and writing skills needed to function effectively in our society. In designing the test, the Department made a conscious effort to eliminate racial or cultural bias through field testing and submission of suspect items to minority review committees. Statistics gathered since the HSPT was first administered in March 1984 show that test scores of DMHS ninth graders have lagged behind scores of ninth graders in other school districts. Thus in 1985-86, the first year that passage of the HSPT became a graduation requirement for entering ninth graders, the DMHS percent passing on both the reading test (74.4) and the mathematics test (58.7) was second lowest in the county. Further, the DMHS percent passing in both subjects was lower than comparable statewide figures (82.5 in reading and 71.8 in math), and much lower than comparable THS figures (99.0 in reading and 94.1 in math). On the writing test as well, DMHS's percent passing (74.4) was lower than either statewide (76.5) or THS (96.6) percentages. Comparison of DMHS's scores to other districts in the same "district factor grouping," a category controlled for income, education level and socioeconomic status, yields similar results, with DMHS having the lowest percent passing in reading, math and writing of the 27 districts in Group F.

Last year, in 1986-87, DMHS's scores on the HSPT improved

substantially. The district's endeavor to "align" its curriculum with the content of the HSPT has apparently paid off. DMHS's percent passing rose dramatically in all three areas, reading (90.6), math (81.5) and writing (88), placing the Englewood district above the statewide passing rate in math (77) and writing (85.9), but slightly below the statewide passing rate in reading (91). Nonetheless, THS did much better, scoring well above average in reading (99.5), math (95.0) and writing (97.2). Notwithstanding this limited success, DMHS still ranked third lowest of the 43 Bergen County districts in reading, fifth lowest in math and seventh lowest in writing. In comparison to other high schools in its district factor group, DMHS also did poorly, ranking second lowest in reading, ninth lowest in math and tying for fifth lowest in writing. However, if one looks at urban districts, DMHS compares favorably, ranking eleventh highest out of 56 districts in its overall passing rate.

DMHS students' performance on the Comprehensive Test of Basic Skills (CTBS) has been below national norms. College-bound students, however, do well at DMHS. Indeed, test scores of DMHS students on the Scholastic Aptitude Test (SAT), the college entrance exam published by Educational Testing Service, are in keeping with New Jersey averages.

While the Englewood Board does not deny that DMHS students fare less well than the rest of Bergen County on standardized tests, it offers a convincing explanation for this difference. In the aggregate, the higher the socioeconomic status of students, the higher will be the standardized test results. This well-recognized relationship has been confirmed by study after study, and even the EAA experts acknowledge that it was a major impetus behind the effective schools movement. National statistics gathered recently by Educational Testing Service and reported in its 1987 *Profile of SAT and Achievement Test Takers* reaffirm the

general pattern. Mean scores of college-bound seniors on the 1987 SAT correlate perfectly with family income and education levels.

Educational consultant Dr. Fleischer disputed the EAA's exaggerated assertion that an "effective school" can fully overcome the influence of socioeconomic status on test scores. Instead, Fleischer interprets effective schools research as making the more modest claim that the adverse effect of low socioeconomic status can be "reduced" but never entirely "neutralized." Students at DMHS bring with them a lower "baseline" of skills, so that lower test scores do not necessarily imply any criticism of the instructional program. As Mr. Segall verified, many students at DMHS come from lower socioeconomic backgrounds or have recently transferred from other places. Proper comparative analysis of DMHS test scores must take socioeconomic factors into account. Although the Education Department's district factor grouping attempts to control for socioeconomic status, this may be misleading when applied to the unusual circumstances of DMHS. Since so many parents in Englewood send their children to private or parochial schools, the socioeconomic status of the community at large is much higher than that of the students actually attending DMHS. Thus, the district factor group, based on the community as a whole, may not accurately reflect the true socioeconomic status of the students at this particular school.

College admissions are another measure of the "outcome" of a good high school. A substantial number of DMHS graduates go on to attend selective four-year colleges. Of the class of 1986, 55 DMHS graduates attended colleges rated "very competitive" or above in *Barron's Profiles of American Colleges* (1966 ed.). The following year, DMHS graduates received 71 acceptances from colleges of the same high caliber.

Appendix E

Moreover, DMHS students may even have a greater chance than THS students of being accepted by some top-notch colleges. Louise Burnham, assistant director of admissions for Yale University, testified that, all other factors being equal, her office would give preference to students coming from schools like DMHS, whose exposure to racial and cultural diversity makes them more interesting. Yale University puts DMHS on its "must visit" list for annual trips, while THS is slated for less frequent visits. Seven DMHS graduates were admitted to Yale in the last two years, compared to only three THS graduates. The significance of such numbers as an abstract indicator of educational excellence is blurred, however, by college minority recruitment programs designed to compensate for years of discrimination. Viewed more broadly, THS sends a greater percentage of its graduates to four-year colleges in general. In 1987, for example, roughly 83% of THS seniors entered some four-year college, as compared to only 64% of DMHS seniors. This spread of 20% or more between the college attendance rates for graduates of the respective schools has held steady for the last five years. Thus, while a DMHS graduate may have a statistical advantage in being accepted to Yale University, the THS graduate is much more likely to go to some four-year college (a finding which may reflect economic as much as educational realities). However, the ability of Cliffs students to pursue higher education does not appear to have been hampered in any way by attendance at DMHS. Of the 23 Cliffs students graduating from DMHS in 1986, a remarkably high 22 of them, nearly 96%, continued on to college. Testimony from DMHS students themselves indicates that those who do attend college regard themselves as well prepared and able to perform college-level work.

Quality of a school district is also related to its capacity to correct identified deficiencies and respond rapidly to constructive

criticism. Many of the problems pinpointed in prior surveys and studies of DMHS sound sadly familiar, including the 1979 Pitruzello and Bishop report (loss of management credibility; faculty alienation; low scores on basic skills tests), the 1979 Gerber memo (lack of leadership; poor morale of teachers and students), and the 1979-80 needs reports by the Parent Teacher Organization (low teacher morale; need for wider use of computers; lack of science activities; inadequate library materials; below grade-level performance in English). With the arrival on the scene of principal Segall, the Englewood Board has mounted an effective campaign to deal with these and other recurring problems.

Indicative of the nature of DMHS's past problems is its delay in completing the reaccreditation process. Middle States Association of Secondary Schools and Colleges ("Middle States"), a voluntary organization engaged in setting accreditation standards for member school districts, has an elaborate procedure which includes a "self-study" by the applicant district and a three-day inspection by a Visiting Committee composed of reputable educators. DMHS is fully accredited by Middle States. Normally, a member district undergoes the accreditation process every ten years. In connection with last full evaluation completed in 1976, the 25-person Visiting Committee issued an extensive report making an unusually large number of recommendations for improvements in staffing, administration and other areas. When the deadline for reevaluation was about to expire in 1986, Middle States granted three successive requests for postponement, the last on the basis that DMHS had suffered "a long period of administrative instability." In the interim, a three-person Investigative Committee paid a brief visit to the school in November 1985 to verify that DMHS remained eligible for accreditation pending evaluation by the regular Visiting Committee, now scheduled to occur three years late in 1988-89.

Appendix E

Goodwill and cooperation are crucial to any successful sending-receiving relationship because the guest district has no direct control over the way in which the host district manages its own affairs. Although the sending district pays the bills for any students it sends, its citizens have no vote on who sits on the receiving district's board of education or how the money should be spent. Before leaving this topic, mention should be made of the upcoming reorganization plan to move the Englewood eighth graders to the DMHS facilities. (See footnote 3, *supra.)* Unfortunately, the Englewood Board failed to consult with the Cliffs Board about this important change prior to its adoption. Mrs. Geiger, president of the Cliffs Board, first learned of the impending reorganization when she happened to attend a meeting of the Englewood Board. Later, she read about the adoption of the plan in the newspaper. Cliffs parents are understandably apprehensive that their ninth graders will be socially isolated by entry into a new school environment where friendships have been forged before their children's arrival.

I FIND that the Cliffs Board of Education has genuine educational reasons for wanting to terminate its sending-receiving relationship with the Englewood Board and to enter into a new sending-receiving relationship with the Tenafly Board. Among the reasons why the Cliffs Board might legitimately prefer THS are: (1) A more suitable academic program for most college-bound Cliffs students; (2) Less need for emphasis on discipline and more opportunity for student independence and self-reliance; (3) Nicer and newer school facilities; (4) A better stocked library; (5) Past administrative instability at DMHS; (6) Past failure by the Englewood Board to correct deficiencies over a period of years and (7) Inadequate consultation by the Englewood Board about an important matter affecting the Cliffs students. It is equally clear that Cliffs students at DMHS can get a good solid education which

more than adequately prepares them for college and for later life. In addition, DMHS has a broader and more comprehensive curriculum, superior in certain respects to the more natrow focus of THS's curriculum, particularly for students interested in vocational careers or requiring special education services. Recently, the Englewood Board has made headway in correcting many of its past problems.

Accordingly, the Cliffs Board's request for relief is made in good faith, for what it conceives to be the best educational interests of its students. Next, then, this discussion will turn to an analysis of the potential negative impacts of severance in each of four categories: racial composition, educational quality, financial condition and facilities impact. For analytic convenience, the negative impact section will be based solely on the loss of the remaining Cliffs students attending DMHS now or in the immediate future.

D. Analysis of Potential Negative Impacts

1. Impact on Racial Composition

Although the expert evidence on this subject is highly technical, resolution of the issue ultimately depends largely on acceptance of one or the other side's projections of future white and minority enrollments. At their core, the differences are clear-cut and readily understandable. Both sides employ the "cohort survival ratio" method, which predicts future enrollment by tracking the historical progression of the same class of students from grade to grade. This method involves a pattern of "survival ratios" or quotients in which the denominator is enrollment in one year and the numerator is enrollment in the immediately succeeding year. Application of an average survival ratio to present

enrollment figures produces an estimate of future enrollment. Initially, the parties diverge on the threshold question of how many years of enrollment data should be utilized and whether any adjustments are appropriate to account for recent trends. Then the parties reach a fundamental parting of the ways. The Englewood Board attempts to quantify what it anticipates will be the "secondary" loss of Englewood resident students in reaction to any decision allowing the Cliffs students to go elsewhere. The Cliffs Board objects, first, to the very concept of looking beyond the immediate loss of Cliffs students in determining negative impacts. Second, the Cliffs Board objects to the lack of any scientific basis for making such "extrapolated" withdrawal projections. Both sides also part company on the likelihood and magnitude of any "rebound" or return of Cliffs students to DMHS in the event that severance is denied and access to THS is blocked.

Dr. Mario Tomei, a professor of educational administration at Glassboro State College retained as an expert by the Cliffs Board, used three years of data or two ratios in making his projections of future Cliffs enrollment at DMHS.[11] Admittedly, the use of additional years of data would have projected a greater number of Cliffs students expected to attend DMHS and, hence, resulted in greater potential impact. Dr. Tomei's rationale for discarding older data was that the "prolonged drop" in enrollment appears to have "leveled off" in recent years, and that use of more than three years of data would not accurately capture current conditions. He admitted that what constitutes a "trend" is a "professional

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11. In making his projections, Dr. Tomei used consolidated enrollment reports and state aid applications for the three most recent school years available at that time (1984-85, 1985-86 and 1986-87). These reports show enrollment data as of September 30th of each year. Consolidated enrollment reports and state aid applications for 1987-88 only recently became available and were marked into evidence after the hearings had ended.

judgment" call, and in his report he himself made projections based on four or five years of data to compensate for particular years when enrollment seemed usually low (for instance, projections of Cliffs enrollment in the elementary grades). None of the parties has cited any recognized standard for determining how many years of data to use in an application for termination of a sending-receiving relationship, but the regulation coming closest to the situation supports Dr. Tomei's decision to base his projections on three years of data.[12] The Englewood Board severely criticizes Dr. Tomei for having selected the three "low point years" of Cliffs enrollment at DMHS, which, in the opinion of its experts, reflect enrollments "artificially depressed" by local political campaigns, the Cliffs Board's vote to terminate the relationship and the willingness of the Tenafly Board to become a substitute receiving district. Instead, the Englewood Board advocates use of seven years or six ratios as the better basis on which to predict future enrollment.

Subsequent events have demonstrated that Dr. Tomei tended to overstate rather than understate future enrollment of Cliffs students at DMHS. When issuing his report in November 1986, Dr. Tomei projected that in 1987-88 a total of 28 Cliffs students would enroll in DMHS, distributed as six in the ninth grade, five in the tenth grade, four in the eleventh grade and thirteen in the twelfth grade. Actual enrollment figures now available for 1987-88 indicate that only 21 Cliffs students enrolled in DMHS as of September 30th, with just two Cliffs students in the ninth grade, three in the tenth grade, three in the eleventh grade and thirteen in

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12. *N.J.A.C.* 6:3-3.1 (a), dealing with the analogous situation of withdrawal from a limited purpose regional school district, requires submission of projected enrollments "based on growth factors using average percentages for the last three school years." However, the Englewood Board points out that the Education Department's cohort survival worksheets have room for seven years of data or six ratios.

the twelfth grade.[13] These 21 Cliffs students are composed of 15 whites, 4 Asians and 2 Hispanics. Since only 15 of the 21 Cliffs students are white, immediate loss of the entire Cliffs contingent would decrease the number of white students at DMHS from 94 to 79. Out of a total DMHS enrollment of 799, the white proportion would fall from 11.8% to 10.2% or a difference of only 1.6%.

On the assumption that Cliffs students would be phased out over a four-year period, Dr. Tomei also projected the impact on racial composition in the school year 1990-91. According to his calculations, total enrollment at DMHS in 1990-91 would be 662 for grades 9-to-12 or 808 for grades 8-to-12. Inclusive of the Cliffs students, the projected white enrollment of DMHS would be 58 students in a 9-12 school or 61 students in an 8-12 school. Thus, without any withdrawal the proportion of white students at DMHS in 1990-91 would be 8.76% in a 9-12 school or 7.55% in an 8-12 school. As can be seen, the proportion of whites enrolled at DMHS is expected to decrease whether or not the Cliffs district is allowed to withdraw. Dr. Tomei projected 21 Cliffs students will be enrolled at DMHS in 1990-91, composed of 15 white students and six students of other races. Loss of the 15 white Cliffs students would reduce the proportion of whites at DMHS to 6.71% in a 9-12 school or 5.84% in an 8-12 school. Phaseout of the Cliffs students would cause a difference of only 2.1% in a 9-12 school or 1.7% in an 8-12 school.

Not surprisingly, the Englewood Board's expert, Dr. Jerry Jacobs, took a different approach and reached very different results

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13. This breakdown comes from the Englewood Board's 1988-89 application for state aid marked R-232. However, a letter from the Englewood Board counsel indicates that two numbers are reversed and the correct order should be three in the ninth grade and two in the tenth grade. R-234

on the same issue. Dr. Jacobs, a professor of sociology and demographic researcher at the University of Pennsylvania, has impeccable academic credentials but no practical experience at the secondary-school level. If the Cliffs students were allowed to withdraw, Dr. Jacobs projected, by 1990-91 there would be only 530 students left at DMHS in grades 9-12. More to the point, he projected a racial composition only 3% white and 1% Asian, and a combined black and Hispanic enrollment constituting 95%, making DMHS "virtually all-minority, in a short period of time." Aside from his use of seven years of data or six ratios in making enrollment projections, the major difference in Dr. Jacobs' methodology is his assumption that 75% of the Englewood white and Asian students and 15% of the Englewood black and Hispanic middle class students will flee the district over a three-year period. Put another way, Dr. Jacobs did not consider the loss of Cliffs students alone, but also sought to quantify an alleged "secondary" loss of Englewood students in reaction to a termination of the sending-receiving relationship.

As support for his thesis, Dr. Jacobs relied on documentation in social science literature and the opinions of other Englewood Board witnesses in this case, who generally concurred with his underlying premise. Essentially, Dr. Jacobs asserted that a decision by the Commissioner in favor of severance would be perceived as a "signal" that DMHS is not a quality school which, in turn, would lead to massive abandonment of their own school system by Englewood whites and by middle class residents of all races. In Dr. Jacobs' view, the residents of Englewood would interpret the Commissioner's action as "a vote of no confidence in DMHS," regardless of the language in which the decision was couched. Support for this view is said to be derived from the scholarly literature on school desegregation and magnet schools, which shows a reluctance on the part of many whites to send their children

to predominantly minority schools, a phenomenon often referred to as "white flight." How Dr. Jacobs arrived from this generalization to the precise numbers of 75% for whites and Asians and 15% for blacks and Hispanics is less clear, although other Englewood Board experts testified that his estimate was "reasonable but conservative." One expert in secondary education, Dr. Fleischer, went so far as to predict that white attrition would approximate 100%, a number which Dr. Jacobs had himself considered but rejected. Once again, the basis for such scientific exactness was obscure.

During cross-examination into the underpinnings of his theory, Dr. Jacobs conceded that most of the literature with which he was familiar involved studies of white resistance to court-ordered desegregation plans and mandatory busing, all of which are readily distinguishable from the present case where Englewood children are already attending a predominantly minority local high school by choice. Unlike the typical desegregation situation, the Englewood students currently at DMHS would not be relocated to an unfamiliar school outside their own neighborhoods. Even in those studies which quantify the extent of opposition to involuntary reassignment of students to achieve better racial balance, the numbers are smaller than the 75% proposed by Dr. Jacobs as the probable white and Asian exodus from DMHS. For example, the Rossell study of desegregation efforts in Boston, Baton Rouge and Los Angeles found, even in the controversial context of forced desegregation, that white attrition from schools with the highest minority concentrations averaged 55% in the first year and over 10% in the second year. In her study, Rossell indicated that Boston and Los Angeles were among the most "hotly contested" northern desegregation cases of those she had studied. Further cross-examination of Dr. Jacobs elicited numerous distinguishing features of the Rossell study, such as lower rates of white attrition in schools which, like DMHS, have a lower

concentration of minorities and the fact that white flight is greater at the elementary level than in high school.

In further support of his views, Dr. Jacobs alluded to the New Brunswick experience, where the proportion of minority (black and Hispanic) enrollment at the high school increased from 65% in 1975-76 to 95% in 1986-87, following severance of a sending-receiving relationship with two largely white neighboring districts.[14] Superficially such comparison may seem persuasive, but in reality the two situations are totally different. New Brunswick is an urban community with a relatively low-income population, low-cost housing, and, at the time of severance, a serious overcrowding problem in its school system. Englewood is an affluent community with expensive homes, a broad tax base, and an improving educational program. There is inadequate reason to assume that the same high degree of attrition experienced by New Brunswick in the last nine years will necessarily be repeated in Englewood, which possesses the means to keep its students in its own school by raising educational standards.

Nor could Dr. Jacobs cite any relevant literature to support his blanket statement that the parents of Englewood would look only at the end result and ignore the reasoning of any Commissioner's decision. Moreover, Dr. Jacobs' position in this regard is inconsistent with his other testimony that parental perceptions of school quality are influenced by a variety of considerations, including whatever good news parents may have heard about a particular school. Dr. Jacobs did not personally talk with any Englewood parents or conduct any survey about their presumed intentions. Significantly, not one Englewood parent testified about

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14. *New Brunswick Bd. of Educ. v. North Brunswick Bd. of Educ.*, 1974 *S.L.D.* 962 (Comm'r 1974), aff'd 1975 *S.L.D.* 1110 (St. Bd. 1975) and *In re Application of the Milltown Bd. of Educ.*, 1976 *S.L.D.* 854 (Comm'r 1976), aff'd 1976 *S.L.D.* 863 (St. Bd. 1976).

plans to remove a child from DMHS if the remaining 21 Cliffs students were allowed to leave. Indeed, the two Englewood parents who did testify on the question both said that they would continue sending their daughters to DMHS, regardless of how this case happened to turn out. So, too, a 1987 DMHS graduate testified that his Englewood classmates, black and white, would be likely to stay at DMHS after the Cliffs students had gone. In fact, the only evidence from which the occurrence of secondary loss might arguably be inferred was Mr. Segall's purely subjective impressions based on conversations with Englewood residents and Dr. Michelle Fine's account of her interview with selected students and an unidentified black DMHS administrator. But Mr. Segall also spoke of a small number of "socially committed" Englewood parents who "would probably keep their children in the public schools." None of this impressionistic evidence supplies the empirical data necessary to quantify any secondary loss. Mr. Segall admitted as much himself when he said that he could not quantify the secondary loss, although he believed it would be "substantial."

Most of the experts, including Dr. Jacobs, agree that there are strategies which school districts can employ to counteract or minimize the extent of white flight, such as the creation of magnet schools designed to attract students to a particular school on a voluntary basis.[15] Articles in the learned journals by Rossell and others have verified the effectiveness of such noncoercive techniques. Englewood superintendent of schools Larry Leverett

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15. While recognizing the efficacy of magnet schools in large districts with multiple high schools, Dr. Jacobs did not think the concept could be meaningfully applied to a single high school district like Englewood because the concept runs counter to the notion of a comprehensive high school and because of doubts whether the Englewood district would have sufficient resources to sustain the more costly program.

described the success of the magnet school concept in Montclair.[16] Dr. Jacobs failed to factor into his estimates of secondary loss the effect of the reforms already implemented by Mr. Segall and other steps which might reasonably be taken to build greater support for DMHS from within the Englewood community.

Other experts took a more realistic approach to the nature of the process by which parents decide to what high school their children should go. Dr. Smoley, the Tenafly Board's educational expert, thought that "a lot of things" entered into a parent's decision, particularly the individual's own prior experience "filtered primarily through the perceptions of other parents and students." Speaking frankly, Dr. Smoley stated his opinion that the Commissioner's decision "would not bear a high degree of weight" on where parents decide to send their children. Dean Herbert London of New York University, a witness with conservative ideological leanings, envisioned the decision-making process as a rational cost-benefit calculation in which parents balance the importance of a number of items that can affect the quality of education. Some of the Englewood Board's own witnesses recognized that the choice of a school is not dictated by any single consideration. Thus, Dr. Evans remarked that the success of a student in a particular school depends on whether his parents "buy into the school's educational goals and mission."

I FIND that, because DMHS is so precariously short of white and Asian students, loss of even a small number of Cliffs students

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16. Montclair High School has a "school within a school" approach which offers specialized opportunities not traditionally provided to students in a regular comprehensive high school. According to Leverett, the Montclair district has been able to maintain a multi-racial, multi-ethnic and socioeconomically diverse student population.

would have a significant impact on racial balance. Seen as a drop in the overall proportion of white students at DMHS, the loss of 15 white Cliffs students would make a difference of 1.6%, seemingly a negligible amount. However, these 15 white students constitute 16% of the total of 94 white students presently at DMHS.

The best estimate of enrollment in the foreseable future came from Dr. Tomei, who used three years of recent data which most accurately reflect current enrollment trends. Projections to the year 1990-91 indicate the loss of 15 white Cliffs students in that year would make a difference of only about 2% in the proportion of whites attending DMHS. Again, however, these 15 white students would constitute approximately 25% of the total number of white students projected for either a 9-12 or an 8-12 high school. Even if one accepts Dr. Tomei's figures, the impact on racial composition must be regarded as substantial in a school with such a low white and Asian population.

Use by Dr. Jacobs of seven years of data in projecting enrollment is not improper, but presents an unduly optimistic picture of what may reasonably be expected in light of most recent experience. Furthermore, Dr. Jacobs' dire prediction of wholesale abandonment by Englewood white and middle class families of their own good school system is sheer speculation, unsubstantiated by adequate facts and based on false analogy. Undoubtedly some amount of "secondary" loss would occur if severance were granted, but Dr. Jacobs has not provided a credible basis for quantifying that amount.

More fundamentally, the "secondary" loss argument proves too much. It places an impossible burden in the path of any sending district dissatisfied with the quality of education its children are receiving. Carried to its logical absurdity, the Commissioner of Education would never be able to grant severance from the worst

receiving districts, for fear of creating a panic among the local inhabitants. While a sending district may rightfully be held responsible for any negative impact caused by the withdrawal of its students, it should not be blamed if the receiving district's population does not support its own school system.

2. Impact on Educational Quality

Declining enrollment causes staffing and scheduling headaches for school administrators. These problems hit hardest the small classes with marginal enrollment, such as advanced placement courses and "singletons," those classes where low student demand makes it impractical to schedule more than one section of a specialized subject. Single-section courses increase the chance of scheduling conflicts for students who must take another course given at the same period. Lower enrollment can also lead to disappointment, when student turnout is so low that a course must be canceled, or to job dislocation, when a reduction of staff is necessitated by a cutback in the number of classes offered. Since both Englewood and Tenafly are experiencing declining enrollment at the high school level, both face this same difficulty to a greater or lesser degree.[17] Indeed, the major reason that the Tenafly Board is so willing to welcome students from other districts is its effort to counteract the adverse effects of declining enrollment at THS.[18]

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17. The problem of declining enrollment is less acute in Tenafly. Due to an influx of families with young children, enrollment at the elementary level has increased continuously since 1983 and will eventually work its way to the high school. Tenafly school officials expect enrollment at THS, now at 891 including tuition students, to peak at "right around 900" by 1988-89 and to stabilize at "slightly under 900" in the early 1990s.

18. Public policy in New Jersey prohibits "robbing Peter to pay Paul" by pitting the educational needs of the potential receiving district against those of the existing

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Appendix E

Assessment of the educational impact depends very much on the enrollment assumptions of the person doing the assessing. Mr. Segall, who adopts Dr. Jacobs' secondary loss analysis, foresees a DMHS left with "the poor, the underachievers, the ones who have no options." Educational quality will then go spiraling downward in a "snowball effect," which is "very difficult to turn around, if not impossible." In Mr. Segall's estimation, the breadth and richness of the DMHS curriculum will be decimated by a paring down of the elective program. DMHS's foreign language department is already encountering difficulty sustaining "a full range of program." Cutbacks would also put advanced placement and honors courses in jeopardy, especially in light of the disproportionately high number of Cliffs students enrolled in such courses. While Mr. Segall does not expect any "sudden drop" in quality, he anticipates a gradual "erosion" over the next four years, reducing the number of advanced placement offerings by half and eliminating the honors physics course. Mr. Segall further points to the loss of "academically motivated" and high-achieving students from Cliffs, many of whom serve as role models and peer leaders for their fellow students. Literature on school desegregation also makes reference to maintenance of a "critical mass" of high-achieving students as contributing "not only to the achievement of these students but of students who have been lower achievers." Other Englewood Board witnesses paint an equally bleak picture. Dr. Evans predicts that severance would mean a loss of teachers, an increase in class size and an "across-the-board" scale-down of the

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receiving district. As articulated in *Brielle Bd. of Educ. v. Manasquan Bd. of Educ.*, No 10-85, slip op. at 13 (St. Bd. Aug. 7, 1985), the State Board will not approve withdrawal "in order to bolster the declining enrollment of a potential receiving district." Hence, in *Brielle*, withdrawal was authorized "because Manasquan is overcrowded and not because Pt. Pleasant Beach is underutilized." *Id.* at fn. 5.

curriculum. Dr. Fleischer sees scheduling becoming "increasingly difficult" in a smaller school and educational opportunity becoming "more limited."

Educational experts who embraced Dr. Tomei's enrollment analysis reached the opposite conclusion, that the impact on quality of education would be well within tolerable limits. EAA's expert in curriculum and instruction, Dr. Thomas Gallia, examined what the impact would have been on the advanced placement program if the 35 Cliffs students who attended DMHS in 1986-87 had not been present. He found little or no effect on five of seven advanced placement courses, since such a small number of Cliffs students were enrolled that their absence would not have made any noticeable difference. AP Biology and AP Spanish Literature were the only two courses where the absence would be felt because Cliffs students comprised roughly half the enrollment. At first Dr. Gallia indicated that there might be a "potential problem" with honors physics, but later he retracted that opinion upon learning that only two Cliffs students took the course in 1985-86. As a practical matter, the decision on whether to discontinue a particular course for lack of sufficient enrollment ultimately rests with the Englewood Board. In the past, the Englewood Board has offered many courses with fewer than ten students and, as admitted in answers to interrogatories, "has consistently supported the continuation of courses with low enrollment when the course is . . . of critical impact for the welfare of the school, *i.e.* advanced placement courses."

Tenafly consultant Dr. Smoley also approached the problem from the perspective of a loss of 35 Cliffs students in 1986-87. Assuming that the Cliffs students are evenly distributed among courses and sections at DMHS, Dr. Smoley estimated that "only five to seven course sections would be lost as a result of losing the 35 Englewood Cliffs students." Staff reductions, which Dr.

Smoley put at the equivalent of 4.6 positions, "could be accommodated by slightly increasing class size which currently is quite low." The impact would be even less if the much lower 1987-88 Cliffs student enrollment figure is used.

An important educational component, which the Englewood Board is afraid might be sacrificed, is the value of diversity in the public schools. Almost every witness acknowledged the benefits of diversity in education. Although some regard them as the indispensable function of a public school, others treat them as a valuable adjunct to the learning experience.[19] Chief witness for the Englewood Board on this topic was Dr. Michelle Fine, a knowledgeable professor at the University of Pennsylvania who holds a doctorate in social psychology. Dr. Fine testified that "social learning," defined as the skills of cooperative citizenship and learning to live with different kinds of people, cannot take place "in the absence of a diverse environment." According to Dr. Fine, it is not enough for people's negative attitudes about race to change. Social learning also requires a change in antisocial behaviors, which can only occur where there is opportunity to interact with people of other ethnic and cultural backgrounds. She did not think that exposure between white and Asian children of the same social and economic class would facilitate social learning, because racial tensions in the Northeastern United States are primarily "among blacks, whites and Hispanics." However, she would "never say that whites and Asians aren't learning from each other cross-culturally and in an interactively beneficial way" at

19. New Jersey regulations incorporate the undisputed benefits of diversity as one of the state educational goals of a thorough and efficient education. *N.J.A.C.* 6:8-2.1(b)6 declares that, among other goals, the public schools shall help every student in the State "[t]o acquire the understanding of and the ability to form responsible relations with a wide range of other people including, but not limited to, those with social and cultural characteristics different from his or her own."

THS. Counsel for the Tenafly Board objects to Dr. Fine's "lumping together" of white and Asians students, citing testimony that Asian students differ in terms of race, religion, culture and native language from the white majority, thus adding an extra dimension to diversity.

Cliffs experts pointed out that racial mixing alone does not automatically achieve better understanding and that educators must actively intervene to promote social learning. Dr. Falzetta, an EAA consultant in school administration, stressed that for social learning to happen a school must provide "organized and structured learning experiences" as part of its regular program and co-curricular activities. Similarly, Dr. Goldberg, the EAA expert in psychology, said that just because a school has a diverse population does not mean that different racial or ethnic groups will "really interrelate." Dr. Goldberg noted that adolescents of high school age often congregate in social cliques and do not necessarily form bonds to others with whom they don't "identify." As Dr. Goldberg put it, children acquire values from "vicarious models" as well as "direct" ones, and even a school with a low minority population can successfully convey social learning through its curriculum. In this regard, the THS curriculum covers material designed to increase appreciation of the heritage of blacks and other minorities, including a required ninth grade course on Afro-Asian history. Tenafly school administrators have introduced activities expressly to improve social learning, including a program instituted to combat anti-Semitism and a leadership retreat where students, chosen as a representative cross-section of the student body, practice communication skills and work together to solve mutual problems. THS also sponsors a wide array of co-curricular activities which foster positive contact with people of other races and nationalities, such as cultural clubs, community service organizations and international student exchanges.

Appendix E

In addition, the Englewood Board alleges that "symbolic losses" would result from severance of the sending-receiving relationship. Utilizing the tools of qualitative research, Dr. Fine conducted an indepth study, which she described as an "ethnographic slice of life" at DMHS. Names of students to be interviewed were picked at random from a list "stratified" on the basis of geography and race. Based on her interviews with 28 students and 12 staff members, she concludes that symbolic losses would include demoralization of students and faculty at DMHS and a damaging blow to self-esteem and school pride. Her report is peppered with pithy excerpts from her interviews, supporting her opinion that severance would be taken by students as "a slap in the face" and a "devastating" step backward from an integrated society. A black female student from Englewood expressed disbelief that, after the advances of the civil rights movement, "they still judge you by color." Another black female Englewood student was resentful that "the whites hate us that much!" Interviews with administrators and teachers yielded similar emotion-laden quotations about whites wanting "to 'escape' " and severance destroying "the spirit, the spark created by diversity." One white teacher of 36 years summed up his reaction by saying that, while the loss of "a few white faces" would not be great, severance would send the wrong "signal" and "be terrible for morale, black and white." Because her study involved so small a sample, Dr. Fine was careful to issue a disclaimer that the results "do not permit [her] to generalize to *all* students, administrators or teachers at DMHS." Nevertheless, in her professional judgment, her data were "sufficient to provide a reliable sense of student and teacher experience at the school."

I FIND that severance would have a substantial negative impact on the quality of education at DMHS, much greater than any material loss caused by the withdrawal of 21 Cliffs students. In

effect, any material losses would be greatly magnified by symbolic losses.

Departure of 21 students, in and of itself, would not seriously impair the educational program at DMHS. Reasonable minds may differ as to what size is "ideal" for a high school, but even a small school of under 800 students is capable of sustaining a quality educational program. Since the Englewood Board possesses the prerogative of reallocating resources to preserve particular courses or to implement other educational priorities, it is speculative to hazard any guess as to which specific courses might be affected by the withdrawal of 21 Cliffs students.

However, Dr. Fine's excellent study substantiates that "any material losses pale by comparison with the symbolic losses" which DMHS would suffer if severance were approved. As that comment implies, the sticking point here is not so much the actual loss of a few students, but what that loss would signify. Those left behind at DMHS would perceive the result as an implicit message that the school is not good enough for whites and Asians, but is acceptable for blacks and Hispanics. Feelings of isolation and inferiority engendered by such perceptions would lower the self-confidence of minority youngsters and be detrimental to their trust in the basic fairness of the educational system. Speaking as a trained psychological observer, Dr. Fine stated that the reaction of black students to this litigation goes beyond mere "disappointment." Black students to whom she spoke uniformly viewed the situation as "betrayal" by the one public institution to which they belonged. Reemergence of the stigma of inferiority associated with segregated school systems would be a regressive development for public education in New Jersey and would have serious repercussions far beyond the immediate parties to this case. Policymakers at the state level must give careful consideration to the negative implications severance would have for future race

relations and social cohesiveness, not only at DMHS but also in other schools throughout this state.

To make matters worse, the Cliffs students are not evenly distributed among all socioeconomic groups and ability levels at DMHS. Rather, as Mr. Segall confirmed, the Cliffs contingent represents a disproportionately large number of upper income and high-achieving students who help to motivate and set an example for economically deprived and lower-achieving students. Loss of these particular students, therefore, would have a much greater negative impact on educational quality than their number alone would suggest.

Any charge that the Tenafly Board is not meeting its regulatory responsibility to encourage social learning must be rejected. Proofs establish that THS, with its large Asian and Jewish student population, has a diverse enrollment in the areas of culture, religion and native language. Sufficient opportunity exists within the Tenafly public schools for students to associate and mingle with persons of ethnic and religious backgrounds different from their own, although exposure to blacks and Hispanics or to persons of different socioeconomic status is severely limited. Commendably, the Tenafly school administration does not leave social learning to chance alone, but plays an active role in teaching social learning skills as an integral part of the required curriculum and an essential function of its co-curricular activities. Yet the finding is inescapable that DMHS has a much richer mix of racial and socioeconomic types which contribute to a more stimulating environment and a greater potential for exchange of ideas. Cliffs students who abandon DMHS would be losing a very enriching environment which they would be unable to duplicate at the more racially and socioeconomically homogenous THS.

Appendix E

3. Impact on Financial Condition

Both the Englewood and Tenafly districts provide strong financial support for their school systems, with Englewood spending more per student than Tenafly. Cost per pupil for the high school program in 1984-85 was $4,873 in Englewood compared to $4,704 in Tenafly. In 1985-86, expenditures per resident pupil averaged $6,314 in Englewood and $5,557 in Tenafly. School tax rates in the two communities "hovered around the state average," while Cliffs' greater property wealth enabled it to maintain a high level of education spending with a relatively low school tax rate.

As before, the major factual dispute between the parties boils down to the question of which enrollment projection to use in making the calculation of loss. Dr. Tomei, who projected an enrollment of 28 Cliffs students at DMHS in 1986-87, multiplied that number times a tuition rate adjusted for inflation to arrive at an estimated loss of $167,748 if all Cliffs students withdrew from DMHS in a single year. Under the more reasonable scenario of a phased withdrawal, he calculated that the tuition loss, "spread over a four year period," would total $140,892 by 1990-91 when withdrawal was complete. In either case, the loss to Englewood would amount to less than one percent of the current expense portion of its annual school budget, a percentage that would shrink in future years as the total budget grows at a faster rate. Expressed in terms of the effect on local Englewood taxpayers, Dr. Tomei figured that the increase in the tax rate to make up the difference in a phased withdrawal would be three cents per $100 of valuation or about $45 per year for a homeowner whose property is assessed at $150,000. In a damaging admission, Dr. Amatuzi, business administrator for the Englewood district, conceded that a loss of this magnitude would have "little impact" on the overall budget (which, in 1984-85, exceeded 16 million dollars). Dr. Amatuzi's

admission is particularly telling because it represents his honest opinion as chief financial officer for the district, before any attempt to reconcile his everyday experience with Dr. Jacobs' theories.

Englewood's expert in school finance, Dr. Margaret Goertz of the Educational Testing Service of Princeton, New Jersey, adopted Dr. Jacobs' assumptions in making her estimates of monetary loss. Her "baseline" for measuring tuition losses was an imputed enrollment of 40% of the Cliffs graduating eighth graders, the highest number under Dr. Jacobs' "rebound" analysis. She postulated an additional reduction in state aid to the Englewood district, predicated on Dr. Jacobs' assumption of a "secondary" withdrawal of Englewood resident students. Ignoring any offsetting savings from the staff reductions anticipated by Dr. Evans, for one, Dr. Goertz insisted that a "small decrease" in enrollments "will not save the district the costs of any instructional staff." All told, Dr. Goertz estimated that the Englewood Board would lose revenues of "nearly $498,000 annually by 1990-91." Presumably, Dr. Goertz considers this annual loss as recurring indefinitely each year that the sending-receiving relationship is no longer in effect.

I FIND that the small diminution in revenues resulting from severance would not have a substantial negative impact on the Englewood district's financial condition. Dr. Tomei provided the best quantification of the amount of loss, estimated to be $167,748 if withdrawal takes place in one year or $140,892 if phased over four years. This sum is insubstantial relative to the multi-million dollar budget for the Englewood school district. Attacks on Dr. Tomei's expertise because of his "numerous errors and recalculations" are unavailing; the issue is not which expert is more facile with numbers, but rather which offers the more convincing rationale for his opinion. In that respect, Dr. Goertz

relied exclusively on Dr. Jacobs' assumptions, previously discredited as speculative. Furthermore, the Englewood Board cannot have it both ways, predicting staff reductions for the purpose of educational impact, but denying any corresponding savings for the purpose of financial impact.

4. Impact on Facilities Utilization

Different numbers for the capacity of DMHS appear in various places on the record. The 1985 evaluation of the school facilities in Englewood by the Education Department gives the "calculated capacity" of DMHS as 1,254. That same number is repeated in two documents developed in February 1986 by the Englewood Board's facilities expert, Kenneth Albert: the long-range facilities plan ("total school capacity" of 1,254); and the five-year capital program 1986-1991 ("functional capacity" of 1,254). However, in his facilities report prepared in November 1986 for this litigation, Mr. Albert used a "functional capacity" of 1,548 at 80% utilization or 1,400 at 70% utilization. The source of these higher numbers was a much earlier June 1979 master plan for the Englewood district ("functional capacity" of 1,548). Conveniently, the higher capacity enables the Englewood Board to argue that severance would cause more severe underutilization problems at DMHS.

Here again, the result turns on which enrollment projections are used. Assuming secondary withdrawal and a 9-to-12 high school, Dr. Jacobs projects enrollment of 530 by 1990-91. Compared to a capacity of 1,548, utilization of DMHS would be 34%. Assuming loss of the Cliffs students only and an 8-to-12 high school, Dr. Tomei projects enrollment of 790 students by 1990-91. Compared to a capacity of 1,254, utilization of DMHS would be 63%. Assuming the Cliffs students remained, Dr. Tomei projects

enrollment of 808 students by 1990-91, increasing utilization to 64%. Therefore, severance under a phased withdrawal plan would make only a one percent difference in the utilization of DMHS. Dr. Tomei calculated similar differences in utilization of one to two percent for the years 1987-88 and 1991-92. In his deposition, Mr. Segall conceded that the impact of phased withdrawal on facilities utilization would be "minimal." In the event of immediate withdrawal, Segall indicated, "We may pick up one or two classrooms during the day."

Nobody contends that THS, which presently has excess capacity, would suffer overcrowding if the Cliffs students went there under a new sending-receiving arrangement.

I FIND that severance would have an insubstantial impact on facilities utilization at DMHS. The most appropriate figure for the capacity of DMHS is 1,254, the number used by the Education Department and by Mr. Albert himself prior to his involvement as an expert witness. Projections of future utilization of DMHS must include the Englewood eighth grade, in consideration of the Englewood Board's plan to have its eighth graders occupy a portion of the available space at the high school complex. For reasons already discussed in detail, projections of future enrollment should not include secondary withdrawal. Severance would thus make a difference of two or less percentage points in the utilization of existing DMHS facilities.

E. The Tenafly Board's Private Tuition Policy

The Englewood Board alleges that the THS private tuition policy causes harm to DMHS "by siphoning off white and Asian students from Englewood and Cliffs, thereby exacerbating declining enrollment and racial imbalance." Many of the facts surrounding the formulation and implementation of the Tenafly

Board's tuition policy are not seriously in dispute. At a meeting in April 1982, the Tenafly Board adopted the policy to take effect beginning with the 1982-83 school year. As stated by the Tenafly Board, the policy was in response to financial pressures resulting from declining enrollment of its own and labor costs in excess of budget caps. Before adoption of the policy, the Tenafly superintendent of schools held a preliminary discussion with his Cliffs counterpart to explore the degree of interest in such a proposal. There is credible evidence, however, that the policy was not targeted for public school students, and, in fact, was originally thought likely to attract mainly students who would otherwise attend private school. No attempt was made to set a tuition rate that might appeal to any particular segment of the market. Instead, Tenafly charges the same rate for tuition students that it charges for Alpine students attending THS under a separate sending-receiving relationship. Currently, that rate is $5,480 per pupil for the 1987-88 school year.[20]

THS pursues a selective admissions process for nonresident students that is much like the admissions process of private schools. Candidates for admission must complete an application form, submit transcripts of previous academic and disciplinary records, authorize release of standardized test scores and obtain a recommendation from the principal of the prior school attended. Applicants and their parent or guardian must also appear for a pre-admission interview. Primarily, the Tenafly district is interested in healthy applicants with good grades and good attendance records. By and large, successful applicants are college-bound students as

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20. This rate is less than the maximum allowable under the state formula. Although the state formula permits apportionment of a part of debt service, the Tenafly Board has not seen fit to pass along any portion of debt service to nonresident students.

distinguished from vocational or educationally-handicapped students. In fact, Dr. Knueppel, Tenafly assistant superintendent, was unaware of any handicapped child ever admitted to THS under the private tuition policy. Acceptance is contingent on availability of space. If a child is accepted, the parent or guardian becomes responsible for transportation and payment of tuition. Scholarships do not exist for families who can't afford to pay. Official Tenafly Board policy declares that nonresidents shall be considered for enrollment without regard to "race, creed, color, national origin or ancestry, sex or religious affiliation." Nowhere on the record is there any direct evidence that THS purposely discriminates on the basis of race or other improper category.[21] Blacks, in particular, are not excluded by virtue of their race, as evidenced by the fact that THS accepted three black tuition students in 1984-85 and again in 1985-86. Nevertheless, the overwhelming majority of tuition-paying students at THS are white or Asian. Of 113 Cliffs students who attended THS through 1985-86, more than 97% were white or Asian. Only three such students were Hispanic. None were black.

Tenafly's private tuition policy is unusual. Considerably more nonresident students attend THS than attend other New Jersey public high schools. Of 234 New Jersey districts studied by Dr. Fleischer, almost 85% had no private tuition students in 1985-86. In 1985-86, THS enrolled 74 such students, more than three times as many as the next highest secondary school, Princeton Regional, which had 27. Only 17 of the 234 districts had five or more tuition students. An informal survey of 20 Bergen County districts by the

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21. The Englewood Board contends that it was hindered in its proofs by the Tenafly Board's failure to maintain records of the total number and racial breakdown of applicants and rejected applicants, "which would be probative as to whether the tuition policy discriminates against blacks and Hispanics."

Appendix E

Tenafly Board reveals that in 1986-87 only two other high schools enrolled tuition students from Cliffs or Englewood. Leonia had two Cliffs and eight Englewood students. Northern Valley had one Englewood student. In the same year, Tenafly had 63 Cliffs students and 13 Englewood students.

Typically, public school districts have tuition policies designed to protect the continuity of education by accommodating students moving into or out of the district during the school year. Englewood, for example, limits its tuition policy to children of future or former residents. Some districts, Ridgewood for instance, extend attendance privileges to children of nonresident staff members without payment of tuition. As noted, Tenafly goes beyond these circumstances and opens its schools to qualified nonresident students in order to subsidize the expense of operating a high quality educational system. The undeniable success of Tenafly's policy is demonstrated by the number of people willing to pay tuition for the privilege of sending their children to THS. In the short time that the policy has been in effect, the total number of private tuition students at THS has grown rapidly from 20 in 1982-83 to 107 in 1987-88. Presently, 76 Cliffs students and 16 Englewood students attend THS on a tuition-paying basis, generating annual revenues of $504,160 for the Tenafly district.

Conflicting evidence was presented on the likelihood of any "rebound" or return of Cliffs students to DMHS in the event that the Cliffs Board loses this case. This question bears on racial and educational impact because of the Englewood Board's argument that current enrollment of Cliffs students at DMHS is depressed by the litigation and would increase once it becomes settled that DMHS will remain the receiving school. Dr. Jacobs sees such outcome as the Commissioner's stamp of approval on the quality of education at DMHS, which will persuade Cliffs parents to return

their children to that school. In Dr. Jacobs' opinion, 20% of the Cliffs students would attend DMHS if the Cliffs Board's petition to sever the sending-receiving relationship is denied and the status quo is maintained. He describes this scenario as a "modest" rebound from abnormally low attendance patterns during the course of this litigation. Translated into total enrollment, Dr. Jacobs projects that by 1990-91 a 9-12 school would have 680 students, less than today but more than if severance were permitted. Racial composition would be 12% white, 5% Asian, and 84% combined black and Hispanic, approximately the same as now exists. If, however, the Commissioner were also to enjoin THS from accepting private tuition students, Dr. Jacobs expects a "substantial" rebound of 40% of the Cliffs students. Total enrollment in a 9-12 school would then increase to 718 by 1990-91, still below current levels. Racial balance would improve to 15% white, 6% Asian and 80% black and Hispanic.

Dr. Jacobs' projected 20% or 40% rebound is based on his interpretation of historical enrollment data. He does not regard the pattern of Cliffs enrollment at DMHS as an uninterrupted decline. Rather, he sees the enrollment pattern as having reached a "plateau" until enrollment dropped sharply in 1977-78 coincident with the Cliffs Board's prior unsuccessful effort to terminate the sending-receiving relationship. He sees enrollment as having retrenched to a second but lower "plateau" and then having dropped in 1983-84 due to developments culminating in this litigation. Since Dr. Jacobs considers the litigation to be primarily responsible for the present decline, he envisions a similar return to the pre-litigation levels if the Englewood Board prevails. Dr. Smoley, the Tenafly Board's consultant, agreed that parents' choices could be influenced by their predictions of which side will win the pending litigation and, in that sense, a victory for the Englewood Board would make it more likely for Cliffs students to attend DMHS.

Appendix E

To counter Dr. Jacobs' rebound testimony, the Cliffs Board proposes to rely on a public opinion poll purportedly showing that few Cliffs parents would return their children to DMHS even if THS is enjoined from receiving them. The Cliffs Board hired Penn & Schoen Associates, a public opinion organization with extensive experience in poll-taking for industry and candidates for public office, to conduct a telephone survey of the attitudes of Cliffs residents toward DMHS. Dr. Douglas Schoen, a partner in the firm, described the "random digit dialing" procedure used, which involved computerized generation of random numbers to ensure that every telephone subscriber had an equal chance of being selected for interview. Additional interviews were conducted with three categories of pre-selected Cliffs households, those with children presently in the Cliffs elementary school, with children presently attending THS, or with children who went to DMHS within the last ten years. Penn & Schoen workers interviewed a total of 592 persons in May and June 1986.

Results of the poll suggest that few Cliffs parents intend to send their children to DMHS under any circumstances. Those who had children at DMHS in the past gave the school higher ratings than those with children at DMHS now. Parents of children below high school age, the pool from which future enrollments must be drawn, gave DMHS "dramatically lower ratings." Of the parents with one child, 79% said they were "not likely" or "definitely would not" send their child to DMHS. A mere 11% were "likely" or "absolutely certain" to send their child to DMHS and 10% were undecided. Similar attitudes were expressed by parents with more than one child. As might be expected, parents who already have children at THS were more adamantly opposed to DMHS. Of the 26 parents in that category who were polled, 23 said they would send their children some place other than DMHS if the THS option were taken away. None of the remaining three said they would send

their children to DMHS. Corroboration of the survey results comes from Dr. Knueppel, the Tenafly school official responsible for collection of tuition payments. In his informal contacts with tuition-paying parents, Dr. Knueppel encountered no one willing to return his child to DMHS if the THS option becomes unavailable.

The Englewood Board attempts to discredit the survey findings by claiming that advance publicity contaminated the results. Despite precautions by the poll-takers to preserve confidentiality, the Englewood Board contends that confidentiality was compromised by two newspaper articles. Three or four months before the poll, a local newspaper distributed free to all Cliffs households carried two articles from which a reader could ascertain for whom the poll would be taken and its avowed purpose. Although there is no way of knowing how many participants in the poll actually read these articles and, of those, how many made the connection to the poll taken months later, the Englewood Board suggests that the existence of these articles renders the poll results meaningless. Furthermore, the Englewood Board asserts that the poll results are tainted by a written announcement from the Cliffs Board sent to every Cliffs resident two weeks before the poll. Written with the prior approval of Dr. Schoen, the letter informed the public that the Cliffs Board had hired a survey firm "[a]s part of the litigation" and stated, "We are only interested in your honest opinion[.]" It also added, "There are no right or wrong answers to these questions."

Commenting on the alleged notice problems, Dr. Schoen explained that the letter is a standard practice in the polling business to assure the public that a reputable organization was undertaking the survey. Carefully worded language in the letter

would, in his professional judgment, encourage persons to give their honest opinions. Naturally, a polling firm has no control over what an independent newspaper chooses to publish. But Dr. Schoen did not believe that the newspaper articles threatened the validity of his poll. Nothing in the articles could possibly have disclosed the contents of the questions, which had not yet been written. Experience also taught him that newspaper articles about survey research get "little attention and recognition" from readers, especially when three or more months intervene before the interviewing starts.

I FIND that the Tenafly Board has a novel tuition policy enacted to alleviate the adverse effects of its own declining enrollment. As applied to THS, the policy has many characteristics of a private school placement, including selective entry requirements, higher academic standards and payment of tuition. On its face the policy may not be racially exclusive, but whites and Asians, as a group, are better able to afford the entry fee. In practice, the policy has attracted a disproportionately high number of students residing in the neighboring communities of Cliffs and Englewood. Its practical effect is to drain upper income white and Asian college-bound students from DMHS, subverting that school's efforts to promote racial balance and luring many of its most academically talented students. Existence of the Tenafly tuition policy also creates social pressures among Cliffs students not to attend DMHS, even though it is the assigned public high school for Cliffs residents.

Factually it is immaterial to a determination of this case how many tuition students from Cliffs might decide to go to private or parochial schools after the Tenafly option is foreclosed. THS is not a private institution, regardless of how it has been conducting its

affairs. While state education officials do not have the authority to prevent someone from attending a nonpubiic school, they do have unchallenged constitutional and statutory responsibility for supervising the public education system. A pernicious practice in the public schools cannot be allowed to continue unchecked simply because otherwise some parents might decide to remove their children from the public school system. Fact-finding should deliberately avoid any inquiry into what choices parents might conceivably exercise if the state's strong policy against segregation in public schools is properly enforced. Otherwise, the process may be misinterpreted as tacit encouragement of flight from the public schools in order to circumvent the law. Thus, it is unhelpful as well as unseemly — to engage in a numbers game regarding how many of the Cliffs or Englewood students now or prospectively at THS would otherwise go to DMHS. The key facts are that THS enrolls 76 Cliffs students and 16 Englewood students who, by all rights, belong at DMHS if they choose to attend public school. Tenafly's tuition policy seriously undermines the continuing ability of the Englewood district to provide equal educational opportunity to all its students.

F. Regionalization

1. Potential Configurations

In the context of the present proceeding, the Englewood Board does not propose "to map out an exact detailed plan of regionalization." Instead, the relief sought is for the Commissioner to order the districts themselves, under his continuing supervision, to work out the specifics of any regional plan. Due to size limitations, neither DMHS (maximum capacity of 1,254) nor THS (maximum capacity in the range of 1,200 to 1,300) would be large enough by itself to accommodate the current combined student

population of 1,690. Several potential configurations, however, would be worth exploring if the Commissioner were to order further study of the regionalization remedy.

One possibility would be to use both the DMHS and THS facilities as they presently exist. Enrollment could be divided according to grade level, with grades nine and ten in one building and grades eleven and twelve in the other building; or, two magnet or specialized schools could be created, one focusing on art and the humanities and the other on science and mathematics; or, each facility could contain a comprehensive 9-to-12 high school. To assign students to schools on the basis of where they live would only perpetuate the racial imbalance which the remedy would be intended to correct.

A second possibility would be to increase THS's capacity by building an addition to the present structure. Sufficient acreage is available at the THS site to comply with state requirements for a larger school building. Questions have arisen, however, as to the stability of the soil and underground water conditions, which can only be resolved by soil boring or other tests. THS is built on a former landfill area, but houses had previously occupied the same location before construction of the existing structure.

The third and last possibility would be the construction of a new high school building for the regional district. Problems associated with this option include the high cost of new construction and the difficulty of finding a suitable vacant site in an already highly developed area.

2. Concept of a "Single Community"

Prior to any discussion of the appropriateness of

regionalization, consideration must be given to whether or not the three municipalities constitute "a single community" as that term is used in the case law.[22] Foremost among the proofs on this point was the Candeub study on the extent to which Tenafly, Englewood and Cliffs share "a sense of identity and common interests." As outlined by planning consultant Burton Cohen, the Candeub study examined the interrelatedness of the three municipalities along several parameters. Initially, it should be noted that the three communities are in close physical proximity and share common borders. DMHS and THS are less than two-and-a-half miles apart, which coincidentally happens to be the maximum distance beyond which busing of remote students to high school is mandated.[23]

Historically, too, all three municipalities have a common origin, each having originally been part of Old Hackensack Township which was subdivided into smaller areas. Long ago Englewood and Cliffs were one municipality, but they split in 1895 over an election contest. Tenafly, which had joined a number of more northern Bergen County villages to form Palisade Township, voted to incorporate separately in 1894, ironically because of a reluctance to share school debts with other districts.

The Candeub study concentrates on socioeconomic

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22. The term "single community" derives from the leading New Jersey case on regionalization of school districts across governmental boundary lines, *Jenkins v. Morris Twp. Sch. Dist.*, 58 *N.J.* 483 (1971). There the Supreme Court took care to confine its holding to the narrow facts before it, involving two municipal entities separately incorporated "but with a single community without visible or factually significant internal boundary separations." 58 *N.J.* at 501. Contrary to *Jenkins* where the party resisting reqionalization "did not dispute the interrelatedness between itself and the Town" (at 487), here that issue is very much in dispute.

23. *N.J.A.C.* 6:21-2.3(a).

differences between Tenafly and Cliffs on the one hand and Englewood on the other. As set forth previously in this decision (Section 111, Part A), the Tenafly and Cliffs populations are largely "upper middle class and homogeneous," while the Englewood population is "diversified in racial composition, income and most other characteristics."

Evidence concerning transportation links between the three locales is inconclusive, and can reasonably be cited for support by either side. In the Candeub study itself, the authors note the absence of "direct road connections" between Tenafly and Cliffs, the presence of only one road linking Englewood and Cliffs, and the presence of two county roads and one local street connecting Englewood and Tenafly. Taken at face value, this would suggest a stronger linkage between the two receiving districts proposed for regionalization (Englewood and Tenafly) than between the sending district (Cliffs) and either possible receiving district (Englewood or Tenafly). On the witness stand, Mr. Cohen testified that high volume highways carry traffic "through" rather than between Tenafly and Englewood, except for one "minor" roadway that dead-ends in an Englewood residential area; that streets which appear on the map to connect Englewood and Cliffs in reality "do not exist" or have fallen into "disrepair"; and that parallel roadways straddle rather than cross the border between Englewood and Cliffs. According to Mr. Cohen, the "flow" of traffic west from Cliffs does not stop in Englewood but continues on to Teaneck and beyond. Still, he recognized that these three municipalities "are connected by major road systems, but that only Englewood has direct road connections with the other two," as if Englewood were the central hub of an interconnected transportation network. Public bus routes operate regularly between Englewood and both Cliffs and Tenafly, but passengers traveling between Tenafly and Cliffs must transfer in Englewood.

Appendix E

Mr. Cohen, whose planning background includes land use and development, thought that housing in Tenafly has more in common with communities to the north and west than with Englewood to the south. In his view, housing patterns exhibit "a classic case of continued development" from Tenafly to the suburbs of Cresskill and Bergenfield. He likened the borderline between Tenafly and Cresskill to "one general subdivision" with imaginary legal boundaries "just superimposed on top." By contrast, density of housing is much greater in Cliffs than in adjacent Englewood. Cliffs is characterized by new houses built on small lots, Englewood by old houses on large lots.

As an integral part of the Candeub study, the Tenafly Board also commissioned a household survey, which supports the conclusion that the three municipalities are "separate and independent" and "do not constitute a single community." Unlike the physical layout of Morristown-Morris Township, where one central business district serves residents from both municipalities, here Cliffs, Englewood and Tenafly each have identifiable shopping areas within their boundaries. The survey establishes that, while consumers tend to purchase groceries and convenience items locally, most households in the three municipalities buy clothing and small appliances at shopping malls, like Paramus Mall, which serve the greater Bergen County area. Likewise, while few residents from one municipality work in either of the other two, the survey demonstrates that the majority of residents in all three commute to jobs in New York City.

With respect to public facilities, Cliffs and Englewood have shared the same public high school for longer than two decades. Informally, Tenafly has recognized some affinity with its neighbors by inviting students from Cliffs and Englewood to switch from DMHS to THS. Cliffs and Englewood residents

jointly use the Englewood public library facilities, managed by a board of trustees which, by the terms of its charter, must include one Cliffs member. Englewood also serves as a regional center for delivery of medical services to residents from all three municipalities. Englewood Hospital, the only hospital in the immediate vicinity, is situated near the Tenafly boundary line. Survey responses indicate the "greatest area of interaction" in the category of medical services. A greater number of Tenafly and Cliffs residents visit doctors' offices in Englewood than in their home towns. Residents who attend religious services "remain predominantly within their own town[s]," except for Cliffs churchgoers who also attend services in neighboring Ft. Lee. Nevertheless, places of worship in Englewood are the "second highest preference" for Tenafly and Cliffs residents.

Other ties between the three municipalities are more attenuated. Parks scattered throughout the area, including one immediately north of the Englewood-Tenafly border, are open to the public, but the survey suggests most people prefer parks in their own municipality or outside of the entire region. People dining out at fast food or more elegant restaurants "either partake locally or go elsewhere in the area" other than the two next-door municipalities. Musical and theatrical performances presented at the John Harms Cultural Center in Englewood draw audiences from the three municipalities but from surrounding communities as well. Social interaction between the three municipalities is "relatively weak," with most residents visiting friends and relatives outside the study area. All three municipalities are served by the same sewerage authority, which operates countywide . All three have the same water company, which also supplies water to a large number of nearby towns. All three, as well as other Bergen County municipalities, are within the circulation area of the same newspapers.

Appendix E

I FIND that, apart from the accident of shared geography and history, Tenafly, Englewood and Cliffs are autonomous and distinct communities. They have existed as separate legal entities for nearly one hundred years. Each has its own downtown business center. Each has a work force which commutes primarily to New York City, not to each other. Housing patterns indicate greater similarity between Tenafly and the northern suburbs than between Tenafly and Englewood. Most commercial, social and recreational activities take place within each municipality itself or outside the area, with only minimum contacts occurring among the three municipalities. Transportation routes pass through Englewood enroute to Cliffs or Tenafly, but do not bind these communities into a single unit. Common use of utility services, newspapers, and medical facilities do not distinguish this particular relationship from that of other separate Bergen County communities.

3. Advantages and Disadvantages of Regionalization

Proper evaluation of the regionalization remedy entails a careful balancing of the advantages and disadvantages of the proposed course of action.

(a) Advantages of Regionalization

Certainly there are many cogent reasons why regionalization under these circumstances might be beneficial:

(1) Regionalization would create a racially balanced school population of approximately 60% whites and Asians and 40% blacks and Hispanics, provided that there would not be extensive defection by parents unwilling to send their children to a forced regional district. Dr. Jacobs projected no white flight in a regionalization scenario based on his assumption that the two

conditions known to cause white flight (a predominantly minority school and a negative parental perception of quality) would not be present. Dr. Evans, who had professional experience with school desegregation in Pittsburgh, was reluctant to say there would be absolutely no white flight; but, for essentially the same reasons as Dr. Jacobs, she thought that the amount of any white flight would be insignificant. Tenafly schools superintendent DeGrow anticipated widespread resistance to forced regionalization on the part of Tenafly residents.

(2) Consolidation would provide "automatic affirmative action" for the predominantly white staff at THS by merging it with the racially integrated staff at DMHS.

(3) By combining complementary strengths and offsetting weaknesses of the two current programs, a regional high school would be able to offer a broader and richer educational program than is possible in a smaller school. Students would have a greater course selection from a comprehensive curriculum including advanced and honors courses, vocational courses and special education courses.

(4) Combined enrollment would counteract the mutual problems of declining enrollment, leading to greater flexibility in scheduling, avoidance of staff cutbacks and expanded co-curricular opportunities. This might end the inter-district struggle to maintain enrollments and replace the present situation of two small schools becoming smaller.

(5) Increased diversity in a regionalized setting would provide opportunities for comprehensive social learning to a greater extent than separate schools, one almost entirely white and Asian and the other predominantly black and Hispanic.

(6) Scholarly literature suggests that exposure to higher-achieving students might improve the academic performance of some lower-performing students. Desegregation is most beneficial, however, when it is begun in kindergarten rather than in high school, when an entire metropolitan area is included, when rigid tracking is avoided and when the desegregated school is predominantly, but not overwhelmingly, white. Only the last condition has any chance of being satisfied in the proposed regional district.

(7) Through pooling of financial and human resources and economies of scale, the regional district might achieve cost efficiencies unavailable to each district individually. Facilities expert Kenneth Albert identified areas where duplicate services could be eliminated or other savings realized in a larger school system.

(8) Cliffs residents would gain representation on a regional school board, while they would remain "disenfranchised" in any sending-receiving relationship.

(b) Disadvantages of Regionalization

Against these advantages must be balanced a series of imposing disadvantages:

(1) There is a serious risk of causing irreparable harm to existing excellence. THS is delivering a high quality of education and DMHS is making significant strides toward improvement. Regionalization would substitute an unknown for a known quantity, and may well destroy what good has been accomplished without achieving the theoretical benefits.

(2) Clashes between two totally different school cultures and climates would make managing a regional school exceedingly difficult. Right now THS emphasizes student independence and creativity while DMHS emphasizes discipline and adherence to rules. Assimilation of these cultures, in Dr. Smoley's opinion, "would be a time-consuming process and would meet with resistance from students, faculty, administrators and parents."

(3) Administrators would find it more difficult to design programs to meet the specific needs of a "bipolar" student body, that is to say a diverse group of students composed of fast learners and slow learners.

(4) Efforts to individualize instruction by "tracking" or ability-grouping of students are likely to undermine the expected benefits of diversity and, at its worst, could lead to segregated groups of students coexisting in the same school building.

(5) Student participation in academic and co-curricular activities is likely to decline in a larger school, due in part to the "crowding out" of more marginal students. For instance, a less athletically talented youngster would stand a better chance of making the varsity football team in a small school than in a larger one. Such narrowing of opportunity would be repeated in various academic and co-curricular pursuits.

(6) Coordination of curriculum from the lower through the upper grades, known as "vertical articulation," becomes more problematic when it is necessary to plan for separate school systems, especially those as divergent in goals and objectives as Tenafly and Englewood.

(7) Local control of the school system would become more

diluted for Tenafly residents, who would be required to share decision-making power with other districts in a regionalized district.

(8) At the present time, both Englewood and Tenafly have a high level of community support for their school systems. Regionalization threatens to erode public support for a school system seen as remote. Dr. DeGrow testified from his experience that it is harder to get voter approval of budgets in a regional high school district because of competing elementary districts "all vying for the same money."

(9) Need for busing of students will increase in a regional district; however, the amount of busing could be kept at a minimum, due to the close proximity of the three municipalities and the nearness of DMHS and THS to each other.

(10) Regionalization would add an extra layer of bureaucracy. Now there are only three districts. After regionalization, there would be four: the new regional high school district and three local K-to-8 districts.

(11) Start-up costs for a new regional district would be high. Uncertainty about the configuration of any regional district makes these costs difficult to quantify with any exactness, but Dr. Smoley and other Tenafly witnesses offered "order of magnitude" estimates of such expenses. Naturally, the most costly option would be to build a completely new school building, which the architect George Johns put at 24 to 28 million dollars for construction costs plus an additional 14 to 28 million dollars for land acquisition. No estimates were given for building an addition onto THS, because the Tenafly Board does not consider that a realistic possibility. Expenditure of considerable time and money

would be required to develop new rules and regulations, revise the curriculum and instructional program, and retrain the staff. Dr. Smoley placed these costs at anywhere from one to two million dollars over a three- to five-year period.

(12) Incremental costs of operating a regional district would also be great. Just how great would again depend on the particular configuration chosen, there being more operational costs if the regional district operates two school buildings rather than one. Pursuant to Dr. Smoley's rough estimates, a regional district will need five central office administrators, together with support staff, and as many as 15 building-level administrators to run two schools, at a net annual cost increase of nearly $260,000 at current salary rates.

(13) Students attending the new regional district during the transition period will suffer an "opportunity cost" until the initial upheaval is over and the new district is running smoothly. Dr. Smoley estimates that this transition will take two years. For students caught in the change, this is the only time in their lives that they will be going to high school.

(c) Cost-Benefit Analysis of Regionalization

I FIND that the disadvantages of regionalization substantially outweigh the advantages. Greatest weight should be given to the risk of causing harm to two functioning districts without obtaining sufficient corresponding benefits. The whole will not necessarily be better than the sum of its parts. It is difficult to imagine forcibly merging two such different high schools without provoking much turmoil and acrimony. Call them "challenges" or "short-term" adjustments if one likes, but nevertheless the disadvantages resulting from regionalization would divert the energies of

administrators and teachers from their main job of educating children. Even if one accepts the Englewood Board's contention that the cost estimates of the Tenafly witnesses are grossly exaggerated, the money still would be better spent on improving educational opportunities in the existing districts. As previously indicated, the decision on what is the right course of action must not be based on fear of local opposition to the law. But if the main rationale for the regionalization remedy is to improve racial balance in both schools, then the Englewood Board has not put on a very convincing case that regionalization is the best solution. If the desegregation literature teaches us anything, it is that forced merger of two districts, one predominantly white and one predominantly black, carries the greatest risk of white flight.

IV. Conclusions of Law

Amended effective November 24, 1986, *N.J.S.A.* 18A:38-13 retains the requirement that an existing sending-receiving relationship at the high school level shall not be "changed or withdrawn . . . except upon application made to and approved by the [C]ommissioner." The amendment deleted language of the predecessor statute, which had conditioned the Commissioner's approval upon a showing of "good and sufficient reason." In its place, the new statute substituted a provision that the Commissioner "shall grant the requestecd change . . . if no substantial negative impact will result therefrom." Clarifying language also added a new statutory standard:

> The [C]ommissioner shall make equitable determinatlons based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education

received by pupils and the effect on the racial composition of the pupil population of the districts.

According to the legislative history, the purpose of the amendment is "to modify the standard applied by the Commissioner of Education when considering requests to alter or terminate sending-receiving relationships between school districts." *Statement of Senate Educ. Comm. attached to Assembly Bill No. 2072 (1986).* In its final form, *N.J.S.A.* 18A:38-13 further provides that a district seeking to sever a sending-receiving relationship must conduct and submit a feasibility study prior to its application.

The only legal issue on which the parties can agree is that this case is governed by the new rather than the old law. As a general principle of statutory construction, the law favors prospective application of statutes to avoid unfairness to people who have acted in reliance on the old rules. *Gibbons v. Gibbons,* 86 *N.J.* 515, 522 (1981). Exceptions may be made, however, when the Legislature has expressed a contrary intent, when the statute is ameliorative or curative, or when the expectations of the parties warrant retroactive application. *Gibbons* at 523. Under the "time-of-decision" doctrine, appellate courts will apply the newer law when there is an intervening change that governs the disposition of issues on appeal. *Riggs v. Long Beach Twp.,* 101 *N.J.* 515 (1986). The purpose of the doctrine is "to effectuate the current policy declared by the legislative body - a policy which presumably is in the public interest." *Kruvant v. Mayor and Council of Cedar Grove,* 82 *N.J.* 435, 440 (1980). Courts have extended the "time-of-decision" doctrine to deliberations of administrative agencies, because "otherwise the administrative body would issue orders contrary to the existing legislation." *Ziffrin,Inc. v. United States,* 318 *U.S.* 73, 78 (1942).

Appendix E

Recently, in *Cranbury Bd. of Educ. v. Lawrence Bd. of Educ.*, No. 95-85 (St. Bd. April 1, 1987), appeal filed, No. A-4253-86T1 (App. Div. May 14, 1987), the State Board declined to apply the new law retroactively, "at least where the evidentiary proceedings had been completed and compliance with the statutory requirement would require relitigation of the matter." (slip op. at 24). But the posture of the present case is significantly different, in that all parties here were on notice of the changes in the law before the administrative hearings commenced. Absent any complaint from the litigants themselves, the most current policy pronouncements embodied in statute ought to control these proceedings, since they represent the latest legislative views on the subject. Nonetheless, it would be clearly unjust under the circumstances to impose on petitioner the precondition of a feasibility study, which requirement did not exist at the time that the petition was filed. In any event, the voluminous report of the EAA experts, although technically not in compliance because prepared after filing of the petition, can be regarded as substantially satisfying the statutory requirement of a feasibility study. Surely none of the parties' interests would be served by unnecessarily prolonging this lengthy proceeding, see, *Cranbury* at 25, or by adding to the paperwork of a record already overburdened by documentation.

Part of the confusion regarding the appropriate legal standard is due to the fact that the law governing dissolution of sending-receiving relationships is still evolving. Before passage of the recent amendment, the State Board had already begun to relax the proofs needed for a sending district to withdraw from a sending-receiving relationship. Earlier case law had required that the district seeking withdrawal bear the almost insurmountable burden of showing that the receiving district was not delivering a thorough and efficient education, a standard which the Cliffs Board's proofs

fall far short of meeting in this instance. In *Washington Twp. Bd. of Educ. v. Upper Freehold Reg. Sch. Dist. Bd. of Educ.*, No. 93-82 (St. Bd. Dec. 7, 1983), the State Board eliminated that standard and, instead, held that the prior statute required only that the Commissioner "weigh all relevant factors," including negative impacts, to determine if good and sufficient reasons for termination had been presented. Since the sole basis for relief was alleged overcrowding and, on remand, the receiving school was found not to be overcrowded, the petition was ultimately dismissed for failure of proof. *Washington Twp. Bd. of Educ. v. Upper Freehold Reg. Sch. Dist. Bd. of Educ.*, Nos. 47-81, 93-82 and 123-84 (St. Bd. June 5, 1985), aff'd No. A-5164-84T1 (App. Div. Sept. 17, 1986). Later, in *Brielle Bd. of Educ. v. Manasquan Bd. of Educ.*, No. 10-85 (St. Bd. Aug. 7, 1985), the State Board indicated that its revised standard, a departure from earlier law, no longer required that "positive benefits" accrue to the high school students sufficient to overcome the "claims" of the receiving district to these pupils (slip. op. at 9). Declaring that overcrowding alone may constitute good and sufficient reason to permit withdrawal, the State Board reiterated that, once the petitioning district has demonstrated it to be in the educational interests of its students, "withdrawal will be permitted if no significant impact is shown." *Ibid.*

Cranbury, currently on appeal, contains the most authoritative State Board interpretation of *N.J.S.A.* 18A:38-13 prior to its recent amendment. There the State Board regarded the statutory scheme as "intended to benefit the students of sending districts" and as not conferring any right "to continue as the receiving district for a particular sending district indefinitely or to perpetuity." (slip op. at 9-10). Mindful of its dual responsibility to ensure stability in sending-receiving relationships and to effectuate local involvement in educational decision-making, the State Board

interpreted the previous statute as requiring the sending district "to establish by a definite presentation of facts that there is an educationally based reason underlying its desire for withdrawal" (at 11-12). Also, the sending district has "the initial burden of producing some evidence that the withdrawal will not significantly impact the receiving district racially, educationally, financially or in the area of facilities." (at 12). Thereafter, the burden "shifts to the receiving district to demonstrate that it will suffer significant negative impact as the result of withdrawal." Such impact must be "definite and tangible." (at 14). On the merits, the State Board found in *Cranbury* that the sending district had established educationally based reasons for preferring one high school over another. Then the State Board went on to find that tuition loss from the phased withdrawal of 90 to 95 students would not significantly impact the finances of the receiving district, saying that "sending-receiving relationships are not intended to insulate receiving districts from financial constraints or its citizens from tax increases." (at 18).

As matters now stand, the amended version of *N.J.S.A.* 18A:38-13 relieves the sending district of any affirmative burden to prove "good and sufficient reasons" in order to justify the withdrawal. *Cranbury* at 21. It does, however, require the Commissioner to make "equitable determinations, based upon consideration of all of the circumstances" including (but not limited to) the negative impacts enumerated in the statute. Emphasis on the "equitable" nature of the determination, as well as reference to "all" the circumstances, not just those expressly mentioned, denotes that the Legislature intended the Commissioner to conduct a broad inquiry into all disadvantages associated with termination of the sending-receiving relationship. If the Legislature had wanted to limit the scope of review to the specific areas of impact listed in the statute, it could easily have said so.

Appendix E

In keeping with the precedent of prior decisional law, this decision has analyzed the negative impacts in terms of direct loss attributable to withdrawal of the Cliffs students attending DMHS now or in the foreseeable future, without taking into account any "secondary" loss of Englewood students or any imputed "rebound" of Cliffs students after this litigation is over. Even with such a narrow focus, however, it is painfully evident that DMHS would suffer substantial negative impact on educational quality if withdrawal were allowed. As more fully developed in the factual findings (Section III, Part D, Subsection 2), withdrawal would have an unacceptable demoralizing influence on the children remaining at DMHS, would be widely perceived as unequal educational treatment on the basis of race, and would wrongfully deprive DMHS of a disproportionately large number of high-achieving students essential to maintenance of academic excellence. *See Brown v. Board of Education,* 347 *U.S.* 483, 494 (1954) (invalidating the doctrine of "separate but equal" schools because that policy "is usually intepreted as denoting the inferiority of the [N]egro group" and because "[a] sense of inferiority affects the motivation of a child to learn.")

These losses are concrete, and demonstrable rather than speculative. They are detectable by reputable academic studies, such as the qualitative research performed by Dr. Fine, and are verifiable by the informed opinion of experienced school administrators, like Dr. Fleischer and Mr. Segall. Moreover, they are "definite," in the dictionary sense that they are "marked by the absence of the ambiguous, obscure, doubtful or tentative." *Webster's Unabridged New International Dictionary,* 592 (3rd ed. 1976). Similarly, they are "tangible," in the sense that they are "able to be perceived as materially existent" and are "substantially real." *Webster's* at 2337. *(But see also, Brown,* 347 *U.S.* at 493, holding that even "intangible" losses are relevant and must be

considered when determining the adverse efferts of segregation in the public schools.) Without more, these losses in themselves are enough to justify denial of the Cliffs Board's application. Recent State Board decisions do not support any different conclusion. *Cranbury* dealt only with negative financial impact. *Washington* and *Brielle* dealt with alleged or actual overcrowding of schools. None of them reached the issues of negative impact on racial balance or overall educational quality.

Consideration of all the equitable circumstances must include a thorough examination of the Tenafly Board's private tuition policy and its detrimental impact on DMHS. This inquiry must be premised on the "long standing and vigorous" policy in New Jersey against racial discrimination and segregation in the public schools, expressed both in the state constitution, *N. J. Const.* (1947), Art. I, ¶ 5, and in state statute, *N.J.S.A.* 18A:38-5.1. *Jenkins v. Morris Twp. Sch. Dist.*, 58 *N.J.* 483 (1971); *Booker v. Plainfield Bd. of Educ.*, 45 *N.J.* 161 (1965). See *also, Branchburg Twp. Bd. of Educ. v. Somerville Bd. of Educ.*, 173 *N.J. Super.* 268 (App. Div. 1980). Tenafly has been fishing in troubled waters. Bluntly stated, the Tenafly Board has adopted a tuition policy which has the clear effect of enticing white and Asian students away from a nearby public high school already experiencing racial imbalance, thereby contributing to a polarized situation. To accomplish its own ends, the Tenafly Board has instituted selective admissions requirements, including what is tantamount to an income test since only those who can afford to pay are eligible for admission. In what could accurately be called "cream-skimming," the Tenafly tuition policy achieves its intended purpose by attracting more highly motivated and academically competent students from its neighboring school district, at the expense of educational quality at DMHS.

Appendix E

In order to condemn Tenafly's beggar-thy-neighbor policy, it is unnecessary to establish that its adoption was the efficient producing cause of the decline in the number of Cliffs students at DMHS. (On the contrary, the evidence here tends to show that the beginning of the decline predated Tenafly's adoption of its tuition policy, although the decline has since accelerated.) It is enough that the Tenafly Board has set in motion a policy which exploits another district's weaknesses for its own benefit, thereby aggravating a bad situation. By the same token, it is unnecessary to find that the Tenafly Board was motivated by improper racial considerations in order to put a halt to the mischief it has made. Good intentions on the part of a wrongdoer "do not serve to negate the State's involvement in violation of a constitutional duty." *Norwood v. Harrison*, 413 *U.S.* 455, 466 (1973). "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Ibid.* Tenafly is hardly in the position of an innocent bystander.

Not only is the Tenafly Board's policy "repugnant," it is also plainly against the law. *Asbury Park Bd. of Educ. v. Shore Reg. High Sch. Dist. Bd. of Educ.*, 1971 *S.L.D.* 221 (Comm'r 1971), aff'd 1971 *S.L.D.* 228 (St. Bd. 1971) is directly on point. In *Asbury Park,* the Shore Regional Board of Education had implemented a tuition policy remarkably similar to that instituted here by the Tenafly Board. Like the Englewood Board, the Asbury Park Board of Education, a receiving district, complained to the Commissioner that the tuition policy increased the potential for segregation at its public high school "by reducing the number of white students in attendance there" and created "a private school system at the expense of the taxpayers." 1971 *S.L.D.* at 222. Indeed, the circumstances in *Asbury Park* were far less compelling than our own, since only eight students who belonged at Asbury Park High School were tuition students at Shore Regional High School,

whereas 92 tuition students at THS belong at DMHS. Nonetheless, the Commissioner viewed the deteriorating situation "with consternation," 1971 *S.L.D.* at 225, and issued immediate injunctive relief returning the eight students to their designated public high school for the coming school year. Although the Commissioner did not find any deliberate act by the Shore Regional Board to circumvent racial integration in the public schools, he credited Asbury Park's "warning" that the tuition policy would lead to "dire consequences" for the receiving district "caused by the withdrawal of selected students," all of whom were white. 1971 *S.L.D.* at 226.

One big difference between *Asbury Park* and the present case is the indication that Shore Regional's facilities were already overcrowded with its own students, a fact which, if true, might give rise to an inference that its motives for accepting additional out-of-district students were other than educational. However, the Commissioner stopped short of actually drawing that inference, and it is clear that the outcome is not dependent on that peculiar wrinkle. On review, the State Board forthrightly announced that "irrespective of the overcrowding issue, the determination was based upon the Commissioner's obligation under the constitution, laws and judicial decisions of New Jersey and the policies of the State Board of Education to combat and eliminate racial imbalance in the public schools." 1971 *S.L.D.* at 229.

If the Commissioner were to give his blessings to establishment of a new sending-receiving relationship between the Cliffs and Tenafly Boards, it would lend legitimacy to an illegitimate arrangement. In essence, it would put the official state imprimatur on what the Tenafly Board has done. *Brown v. Board of Educ.*, 347 *U.S.* at 494 ("The impact is greater when it has the sanction of the law[.]") Formalization of the relationship under

state auspices would reward the Tenafly Board for its illegal tuition policy and create an incentive for other school districts to follow suit.

Relying on *N.J.S.A.* 18A:38-3, the Tenafly Board argues that the Commissioner of Education lacks legal authority to prohibit a local school district from setting its own conditions for admission of nonresident students. *N.J.S.A.*18A:38-3 does confer broad discretion on local school districts to admit nonresidents to its schools "upon such terms, and with or without payment of tuition, as the board may prescribe." But the local board's discretion is not limitless and can be curtailed for abuse. Art. VIII, Sec. IV, ¶ 1 of the *N.J. Constit.* (1947) mandates a thorough and efficient system of free public schools for all New Jersey children between the ages of five and eighteen. General supervision and control of public education in New Jersey is vested in the Department of Education, *N.J.S.A.* 18A:4-1, -10, of which the Commissioner is chief executive and administrative officer, *N.J.S.A.* 18A:4-22. In the exercise of his supervisory powers, the Commissioner shall enforce all rules of the State Board, *N.J.S.A.* 18A:4-23, and, if advisable, shall inquire into the thoroughness and efficiency of operation of any public school, *N.J.S.A.* 18A:4-24. New Jersey's highest court has taken an expansive view of the powers of the Commissioner and the State Board. *In re Upper Freehold Reg. Sch. Dist.*, 86 *N.J.* 265, 274 (1981). *See also, Plainfield Bd. of Educ. v. Cooperman,* 105 *N.J.* 587, 596-97 ("[S]pecific power can be inferred from the broad powers that are granted to the Department.") *Jenkins* at 504 ("The Commissioner has been appropriately charged with high responsibilities in the educational field and if he is faithfully to discharge them in furtherance of the State's enlightened policies he must have corresponding powers.") *Robinson v. Cahill,* 69 *N.J.* 449, 461 (Commissioner and State Board have "received a vast grant of power and upon them has been

placed a great and ongoing responsibility.") Thus, the Commissioner possesses not only the power, but also the duty, to take decisive action whenever, as here, local board action clearly conflicts with overriding state policy and threatens to cause substantial harm to another local district. In the event of any true conflict between state constitutionally based polices in favor of racial integration in the public schools and local policies governing attendance by nonresidents, the state policy "would have to be given primacy." *Asbury Park*, 1971 *S.L.D.* at 229.

In re Jamesburg High School Closing, 83 *N.J.* 540, 549 (1980), cited by the Tenafly Board for the proposition that the Commissioner is without inherent authority to act "[w]here there exists reasonable doubt" as to his legislative authorization, is inapposite. *Jamesburg* involved the tenure rights of teachers transferred to a new district after closing of the school at which they taught. Since tenure is entirely a statutory status, the court held that the Commissioner cannot on his own confer tenure rights where none exist by statute. That is very different from saying in the instant case that the Commissioner has the necessary means to carry out unambiguous state law mandating a thorough and efficient education and prohibiting segregation in the public schools.

State education officials should resist any temptation to count heads of those Cliffs students who would not return to DMHS if the THS option is closed to them. Aside from the notorious unreliability of even the most carefully conducted public opinion polls, the possibility that many or even most Cliffs parents might choose private over public school is irrelevant to the legal issues of this case. Government does not stick its toe in the water or hold a plebiscite to determine whether or not a public school may adopt discriminatory admission requirements in contravention of strong

state policy. *Cf,. Jenkins* at 492 (non-binding referendum criticized as an "illegal and improper abdication" of governmental responsibility). Granted that the state may not interfere with the constitutionally protected right of a parent to choose to send a child to private or religious school, *Pierce v. Society of Sisters,* 268 *U.S.* 510 (1925), it does not follow, either by logic or law, that parents possess the generalized right to choose THS or any other public school outside their own school district. Subsequent cases have stressed the "limited scope" of the *Pierce* doctrine, which simply "affirmed the right of private schools to exist and to operate." *Runyon v. McCrary,* 427 *U.S.* 160, 177 (1976). *Accord, Norwood v. Harrison,* 413 *U.S.* at 462. Prohibiting a taxpayer-supported public school from behaving like a private institution will not threaten the independence of any private or parochial school. Whether or not a parent chooses to send a child to private or parochial school it no business of the state. What policies are followed in the public schools are a legitimate matter of state concern.

When fashioning an appropriate remedy, the Commissioner need not be timid out of any apprehension that Cliffs students who would have gone to THS will avoid DMHS simply by transferring to another public high school. Now that the ruling in *Asbury Park* has been forcefully restated, it should not be presumed that other public school districts will willingly break the law. Were that to happen, however, the Commissioner has a broad range of options to enforce his orders, including seeking the assistance of the courts or withholding state aid from an offending district, *N.J.S.A.* 18A:55-2. In *Asbury Park,* the Commissioner ordered that *all* students improperly at Shore Regional be promptly returned to Asbury Park High School, and the Englewood Board has the right to demand the same relief here. Graciously, however, the Englewood Board has requested the lesser relief of an injunction against new admissions to THS and has consented to allowing

those Cliffs and Englewood students already enrolled at THS to continue through graduation. This will help minimize disruption to the education of students in the midst of the Tenafly program and give the Tenafly Board time to adjust to the unexpected loss of tuition revenues.

Denial of the Cliffs Board's petition for severance and issuance of an injunction against the Tenafly Board's tuition policy do not fully dispose of all claims, since the Englewood Board further contends that regionalization is the best remedy to improve education and enforce state policy against segregation. In *Jenkins,* the leading New Jersey case on involuntary merger of separate school districts across governmental lines, the New Jersey Supreme Court made repeated reference to the uniqueness of the factual circumstances. Early in its opinion, the Court started out by commenting that Morristown and Morris Township "remained so interrelated that they may realistically be viewed as a single community, probably a unique one in our State." (58 *N.J.* at 485). As previously noted, several pages later the Court went on to emphasize that its analysis dealt "not with multiple communities but with a single community without visible or factually significant internal boundary separations." (at 501). Within a few more pages, the Court repeated virtually the identical language and added that the record before it "overwhelmingly points educationally towards a single regional district rather than separate local districts." (at 505). Morristown and Morris Township have an unusual hole-in-the-donut shape (Morristown in the center is encircled by Morris Township) and the two share a common downtown area. Englewood, Tenafly and Cliffs are distinct geographic entities, each with its own commercial center. Clearly, then, *Jenkins* is distinguishable on its specific facts and it would take an extension to apply its reasoning to the present situation.

Appendix E

In the face of such abundance of caution in *Jenkins,* the Englewood Board urges that, in traditional judicial fashion, the Court merely refrained from delineating "the outermost reach of the policy it was announcing." *See Note, Racial Imbalance and Municipal Boundaries Educational Crisis in Morristown,* 24 Rutgers L. Rev. 354 (1970) Possibly so, although it is perhaps significant that, in the almost seventeen years since *Jenkins* was decided, neither the courts nor the Commissioner has seen fit to order another involuntary merger of two or more school districts. See *New Brunswick Bd. of Educ. v. North Brunswick Bd. of Ed.,* 1974 *S.L.D.* 962 (Comm'r 1974), aff'd 1975 *S.L.D.* 1110 (St. Bd. 1975). (There have, on the other hand, been several court or agency ordered studies of regionalization between unwilling districts. *Branchburg Twp. Bd. of Educ. v. Somerville Bd. of Educ.,* 173 *N.J. Super.* at *276; Bloomingdale Bd. of Educ. v. Butler Bd. of Educ.,* 1976 *S.L.D. 944* (Comm'r 1976).) Therefore, the question becomes whether this case presents the right opportunity for the Commissioner to extend the *Jenkins* analysis to new territory.

Jenkins itself placed heavy emphasis on the fact that merger was possible "without any practical upheavals" and would be entirely "reasonable, feasible and workable." (58 *N.J.* at 505). For the reasons elaborated in the factual findings above (Section III, Part F, Subsection 3), here the potential risks of regionalization are greater than any potential rewards. In *Jenkins,* Morristown and Morris Township already shared the same high school facilities and regionalization simply altered the existing legal relationship while preserving the status quo. Here the facts are that Englewood and Tenafly operate very different high schools and regionalization would attempt to combine them in some yet to be determined way. Worst of all, regionalization would risk destroying what now seems to be working relatively well, without adequate assurance of replacing it with anything significantly

better. On the assumption that the *Jenkins* remedy might well be stretched to cover new circumstances, this does not appear to be an appropriate factual setting in which to do so.

Last, the Cliffs and Tenafly Boards advocate the establishment of a "dual sending-receiving relationship" as a way of maximizing parental choice in determining what school their children shall attend. Freedom of choice is an appealing idea, and one that is currently under study by state education officials. *Annual Message to the New Jersey State Legislature by Governor Thomas H. Kean* (January 12, 1988). But, as proposed by the parties, a "dual sending-receiving relationship" would afford only Cliffs parents the choice of either THS or DMHS, while the Englewood parents would have no choice. Such preferential treatment, where whites and Asians living in Cliffs can choose but blacks and Hispanics living in Englewood cannot, must fail for one-sidedness and lack of mutuality.

V. Order

It is *Ordered* that the Cliffs Board's petition for termination of the sending-relationship with the Englewood Board and for establishment of a new sending-receiving relationship with the Tenafly Board is hereby *denied*.

It is further *Ordered* that the Cliffs Board's petition for establishment of a dual sending-receiving relationship is hereby *denied*.

It is further *Ordered* that the Englewood Board's cross-petition for injunctive relief is hereby *granted*. The Tenafly Board is hereby directed to cease and desist from admitting to any of its schools on a tuition-paying or other basis any students who are

residents of either Cliffs or Englewood, and also from interfering in any way with the attendance of such students at DMHS; provided, however, that students residing in Cliffs or Englewood who are currently enrolled in the Tenafly school system on the date of this decision may continue in that system through graduation.

And it is further Ordered that the Englewood Board's cross-petition for the establishment of a regional high school district is hereby denied.

This recommended decision may be adopted, modified or rejected by the *COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN*, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman, does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordancewith *N.J.S.A.* 52:14B-10.

I hereby *FILE* this Initial Decision with *SAUL COOPERMAN* for consideration.

April 18, 1988
DATE

s/ Ken R. Springer
KEN R. SPRINGER, ALJ

April 18, 1988
DATE

Receipt Acknowledged
s/ Seymour Weiss
DEPARTMENT OF EDUCATIONS

APR 19 1988
DATE

Mailed to Parties:
s/ Ronald I. Parker / K.S.
FOR OFFICE OF ADMINISTRATIVE LAW

Appendix E

APPENDIX

Petitioner's Witnesses

1. Dr. Harold S. France, former superintendent of schools, Englewood Cliffs public schools

2. Wolfgang H. Reich, former president, Englewood Cliffs Board of Education

3. Carlin J. Geiger, president, Englewood Cliffs Board of Education

4. Dr. Edward H. White, consultant in school administation and school effectiveness, EAA Associates

5. Dr. John N. Falzetta, consultant in school administration, curriculum and instruction, EAA Associates

6. Dr. Mario Tomei, consultant in school administration, EAA Associates

7. Dr. Thomas J. Gallia, consultant in curriculum and instruction, EAA Associates

8. Dr. Douglas E. Schoen, public opinion researcher, Penn & Schoen Associates

9. Dr. Richard R. Smith, consultant in curriculum planning and statistical analysis of tests, EAA Associates

10. Dr. Lois S. Goldberg, consultant in educational psychology, EAA Associates

Appendix E

11. Dr. Herbert I. London, dean of the Gallatin Division, New York University

Respondent's Witnesses

12. Louise Burnham, assistant director of undergraduate admissions, Yale University

13. Richard E. Segall, principal, Dwight Morrow High School

14. Dr. Michelle Fine, consultant in social psychology in the field of education

15. Sarah Van Gunten, director of language arts, Englewood District

16. Kenneth Albert, consultant in the field of facilities

17. Barbara Marsan, former president, Englewood Board of Education

18. Evan Canellos, former student at Dwight Morrow High School, Englewood; Englewood Cliffs resident

19. Larry Leverett, superintendent of schools, Englewood Public Schools

20. Elaine Canellos, parent of one former and two current students at Dwight Morrow High School; Englewood Cliffs resident

21. Dr. Shirley Cohen, consultant in special education

Appendix E

22. Dr. Jerry Alan Jacobs, consultant in demography and quantitative social sciences

23. Quester Devette Hannah, Jr., former student at Dwight Morrow High School; Englewood resident

24. Eva Marie Jeanette, former student at Dwight Morrow High School; Englewood Cliffs resident

25. Dr. Margaret Eckel Goertz, consultant in school finance

26. Dr. Alma McCloud Evans, consultant in educational curriculum, instruction, administration and supervision

27. Dr. Robert D. Fleischer, consultant in secondary education

Cross Respondent's Witnesses

28. Richard Dreyfus, member of the Tenafly Board of Education

29. Dr. Daniel P. Knueppel, assistant superintendent for business, Tenafly Public Schools and board secretary to the Tenafly Board of Education

30. Charles Wilson, principal of Tenafly High School

31. Gerhard Van Biema, past president and former member of the Tenafly Board of Education and current member of the Tenafly Citizen's Education Council

32. Adrienne Meltzer, Tenafly community leader and parent of Tenafly High School graduates

Appendix E

33. William Parmer, Tenafly councilman

34. George Johns, consultant in architecture and school facilities Harsen & Johns, P.A.,

35. Burton Cohen, consultant in municipal and community planning, Candeub, Fleissig & Associates

36. Dr. Eugene R. Smoley, Jr., consultant in secondary education and educational management, Cresap, McCormick & Paget

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No. 93-373

In the

Supreme Court of the United States

October Term, 1993

Board of Education of the Borough of Englewood Cliffs,
Petitioner,

v.

Board of Education of the City of Englewood and the
State Board of Education of the State of New Jersey,
Respondents.

On Petition For a Writ of Certiorari
to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Englewood Cliffs Board of Education have standing to raise constitutional equal protection claims on behalf of Englewood Cliffs' students?

2. Is the determination of the New Jersey Supreme Court final for the purposes of review by this Court where a possible remedy to this litigation -- the regionalization of the Englewood Cliffs, Englewood, and Tenafly public school districts and perhaps others -- is currently being studied by the New Jersey Department of Education and could influence the outcome of this litigation?

3. Has Englewood Cliffs raised a colorable equal protection claim where the determinations of New Jersey's highest education officials 1) to deny severance of the "sending-receiving" relationship under which Englewood Cliffs sends its high school students to Englewood's Dwight Morrow High School, and 2) to prevent other New Jersey public schools from accepting Englewood Cliffs or Englewood students on a tuition basis, created neither a racial quota nor a strictly race-based classification because they affected all students in both districts regardless of race and were designed to further the legitimate and compelling state interest of promoting racial balance in the public schools?

TABLE OF CONTENTS

		PAGE
QUESTIONS PRESENTED		i
COUNTERSTATEMENT OF JURISDICTION.		1
COUNTERSTATEMENT OF THE CASE.		2
A.	State Statutory Background. . . .	3
B.	The Administrative Decisions. . .	4
C.	New Jersey State Court Decisions.	8
D.	This Petition	11
REASONS FOR DENYING THE PETITION		12
1.	Since the Judgment of the Supreme Court of New Jersey Is Not Final Under 28 U.S.C. §1257, This Court Should Deny Certiorari For Lack of Jurisdiction	13
2.	The Board of Education of Englewood Cliffs Lacks Standing to Raise Equal Protection Claims on Behalf of Students in Its District.	15
3.	The New Jersey Courts Properly Concluded That No Equal Protection Violation Occurred Here.	17
CONCLUSION		20

TABLE OF AUTHORITIES

CASES CITED

PAGE

Asarco v. Kadish, 490 U.S. 605 (1989) 16

Board of Education v. Allen, 392 U.S. 236 (1968) 16

Branchburg Tp. Bd. of Ed. v. Somerville Bd. of Ed., 173 N.J. Super. 268, 414 A.2d 259 (App. Div. 1980) 3

City of Newark v. New Jersey, 262 U.S. 192 (1923) 15

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 9, 18

City of Trenton v. New Jersey, 262 U.S. 182 (1923) 15

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 14

Delta Special School District v. State Board of Education, 745 F.2d 532 (8th Cir. 1984) 15

Flynt v. Ohio, 451 U.S. 619 (1981) 13

Freeman v. Pitts, 112 S.Ct. 1430 (1992) 19

Golden v. Zwickler, 394 U.S. 103 (1969) 16

Merchantville Bd. of Ed. v. Pennsauken Tp. Bd. of Ed., 204 N.J. Super. 508, 499 A.2d 253 (App. Div. 1985) 3

Metro Broadcasting, Inc. v. F.C.C., 110 S.Ct. 2997 (1990) 18

Millikken v. Bradley, 418 U.S. 717 (1974) 19

Minnick v. California Dep't of Corrections, 452 U.S. 105 (1982) 14

North Dakota Pharmacy Bd. v. Snyder's Stores,414 U.S. 156 (1973) 2, 13, 14

O'Shea v. Littleton, 414 U.S. 488 (1974) 16

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 9, 17

Republic National Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 2, 14

Shaw v. Reno, 113 S.Ct. 2816 (1993) 17

Swann v. Charlotte-Mecklenberg Bd. of Ed., 402 U.S. 1 (1971) 18

Triplett v. Tiemann, 302 F. Supp. 1239 (D. Neb. 1969) 15

Valley Forge Christian College v. Americans United, Etc., 454 U.S. (1982) 1, 16

Williams v. Mayor & City Council of Baltimore, 289 U.S. 36 (1933) 15

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 9

STATUTES CITED

28 U.S.C. §1257 . . . . . 2, 12, 13

N.J. Stat. Ann. 18A:38-3 . . . . . 6, 7

N.J. Stat. Ann. 18A:38-8 3

N.J. Stat. Ann. 18A:38-11 3

N.J. Stat. Ann. 18A:38-13 3

N.J. Stat. Ann. 18A:38-14 4

N.J. Stat. Ann. 52:14B-10 6

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF JURISDICTION

Federal standing requirements preclude the Englewood Cliffs School Board from raising the constitutional rights of its students because neither the Cliffs board nor its members has suffered a direct constitutional injury from the decisions of State education officials which mandate the public high school to be attended by Englewood Cliffs and Englewood students who choose to attend public school. See Valley Forge Christian College v. Americans United, Etc., 454 U.S. 464 (1982). Moreover, since the New Jersey courts affirmed the State's right to proceed with a study analyzing the possible regionalization of the Englewood, Englewood Cliffs, and Tenafly districts, as well as others, that study is ongoing at the present time, and more state judicial

proceedings are likely, the judgment below is not final for the purposes of review by this Court under 28 U.S.C. §1257. See North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156 (1973); Republic National Gas Co. v. Oklahoma, 334 U.S. 62 (1948).

COUNTERSTATEMENT OF THE CASE

The Board of Education of Englewood Cliffs ("Cliffs") seeks certiorari to overturn the decisions of New Jersey's highest education officials -- the Commissioner of the Department of Education and the State Board of Education -- that high school students from Cliffs, which does not have its own high school, must attend public school at Dwight Morrow High School in Englewood if they choose to attend public school, in keeping with the longstanding, voluntary, "sending-receiving" agreement between the districts. These decisions, reached after 99 days of administrative hearings and painstaking review of the facts and legal arguments raised by the parties, were based on the state officials' application of N.J.S.A. 18A:38-13 to the circumstances of this case. That statute prevents a district from withdrawing from a sending-receiving relationship if termination of the agreement will have a "substantial negative impact" on the educational quality, racial composition or financial health of either district. Both the Commissioner and the State Board concluded unequivocally that severance must be denied here because it would have a substantial negative impact on the educational quality and racial balance at Dwight Morrow. The New Jersey courts agreed, calling that conclusion "unassailable." (App. B at 66a). Furthermore, the state officials and state courts concluded that the relationship between the districts had been undermined by the private tuition policy of another district, Tenafly, and enjoined Tenafly and all other public school districts in New Jersey from accepting students from either Cliffs or Englewood.

The Cliffs Board seeks further review from this Court of these determinations, all well-grounded in New Jersey law, claiming that they violate the equal protection rights of Cliffs' students. These arguments were rejected resoundingly below (Apps. A and B), and are totally lacking merit. Certiorari should consequently be denied.

A. State Statutory Background

In New Jersey, school districts are typically organized at the municipal level, with the State having 593 school districts. Where a school district is too small to support its own high school, it must designate a high school outside of the district for the education of its high school students. N.J.Stat.Ann. 18A:38-11. This "sending-receiving relationship" is essentially a contract between the two districts whereby educational services are provided in exchange for a fixed tuition payment. N.J.Stat.Ann. 18A:38-8. To promote stability in the relationships and sound educational policy, however, neither district can withdraw from the relationship "except upon application made to and approved by the Commissioner [of the Department of Education]." N.J.Stat.Ann. 18A:38-13. New Jersey's courts have recognized the "expansive powers" of the Commissioner "over all sending-receiving relationships ... to provide stability...." Merchantville Bd. of Ed. v. Pennsauken Tp. Bd. of Ed., 204 N.J. Super. 508, 499 A.2d 523 (App. Div. 1985); see also Branchburg Tp. Bd. of Ed. v. Somerville Bd. of Ed., 173 N.J. Super. 268, 414 A.2d 259 (App. Div. 1980).

Termination of sending-receiving relationships is governed by N.J.Stat.Ann. 18A:38-13. Prior to submitting an application for severance, the district proposing termination must prepare a feasibility study addressing "the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on

the racial composition of the pupil population of each of the districts." Ibid. After reviewing this study, the Commissioner "shall make equitable determinations based upon consideration of all the circumstances." Finally, the Commissioner "shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom." Ibid. The Commissioner's determination in a sending-receiving case is subject to appeal to the New Jersey State Board of Education which "may in its discretion affirm, reverse, revise or modify" the Commissioner's decision. N.J.Stat.Ann. 18A:38-14.

B. The Administrative Decisions

Cliffs filed a petition with the New Jersey Commissioner of Education ("Commissioner") in December 1985 seeking to terminate its sending-receiving relationship with Englewood which had begun almost 20 years earlier. Under that agreement, Cliffs sent its high school students to Dwight Morrow High School, Englewood's only public high school. The Englewood Board opposed severance and filed a cross-petition against the Board of Education of the Borough of Tenafly ("Tenafly") because Tenafly had implemented a tuition program for non-resident high school students which had attracted significant numbers of Cliffs' pupils as well as some Englewood students. The Englewood Board also sought the creation of a regional school district at the high school level to be comprised of Englewood, Englewood Cliffs and Tenafly. The Commissioner transmitted the entire matter to the New Jersey Office of Administrative Law, where 99 days of evidentiary hearings were conducted from January 7, 1987 to October 6, 1987 before an Administrative Law Judge ("ALJ").

On April 18, 1988, the ALJ issued an initial decision recommending the denial of Cliffs' petition for severance because of the substantial negative impact that termination would have on the quality of education at Dwight Morrow

(App. E. at 244a). The ALJ concluded that this negative impact would be created by the loss of talented, college-bound Cliffs students, who were largely white and Asian, and a further erosion of the racial balance at Dwight Morrow, by then more than 85% black and Hispanic (App. E. at 205a), which had contributed to a "very enriching environment" at the school. (App. E at 264a).

The ALJ also recommended strongly that Tenafly be restrained from accepting any students from Cliffs or Englewood. He noted that Tenafly's private tuition policy was unusual, indeed aberrational when compared with other public schools in New Jersey which either have no tuition students or very few tuition students (App. E at 252a-253a).[1] After examining the policy, the ALJ concluded that it had many characteristics of private school placement, leading to a tendency to be racially selective because "whites and Asians, as a group, are better able to afford the entry fee." (App. E at 257a). Most significantly, the ALJ found that, "In practice, the policy has attracted a disproportionately high number of students residing in ... Cliffs and Englewood. Its practical effect is to drain upper income white and Asian college-bound students from DMHS, subverting that school's efforts to promote racial balance and luring many of its most academically talented students." (Ibid.; emphasis added). He then noted that while state education officials cannot prevent children from attending a nonpublic school, they do have "unchallenged constitutional and statutory responsibility for supervising the public education system." (App. E at 258a). He urged

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[1] Typically, public school districts in New Jersey have tuition policies designed to protect the continuity of education by accommodating students moving into or out of the district during the school year. Some districts extend attendance privileges to children of nonresident staff members without payment of tuition. Tenafly, however, implemented a selective admissions policy for non-resident, tuition-paying students in order to subsidize the operation of its high school during a period of declining enrollment. (App. E at 252a to 258a).

those officials to prevent Tenafly's policy from further undermining "the continuing ability of the Englewood district to provide equal educational opportunity as to all its students" by enjoining the policy as it applied to Cliffs and Englewood. (Ibid.)

The ALJ also denied Englewood's request to create a regional high school district combining Englewood, Cliffs and Tenafly. Under New Jersey administrative law, the ALJ's recommended decision was transmitted to the Commissioner for final action. N.J.Stat.Ann. 52:14B-10.

The Commissioner adopted the ALJ's key recommendations denying severance of the sending-receiving relationship and enjoining Tenafly's tuition policy for Englewood and Cliffs students (App. D at 148a to 187a). Notably, the Commissioner found that if he granted severance he "would place an imprimatur" on white flight from Dwight Morrow. (App. D at 165a). The Commissioner further found that the Tenafly tuition policy exacerbated racial imbalance at Dwight Morrow. (App. D at 183a). The Commissioner also observed that while N.J.Stat.Ann. 18A:38-3 permits local boards of education to enact tuition policies, when there is a conflict between that right and the "constitutionally and statutorily based policies of this state on racial integration, the Commissioner's obligation is to combat racial imbalance." (App. D at 187a). The Commissioner also agreed with the ALJ that regionalization of the three districts at the high school level was not appropriate.

These determinations were appealed to the State Board of Education. On April 5, 1990, the State Board affirmed the ruling of the ALJ and the Commissioner that termination of the sending-receiving relationship would have a substantial negative impact on Dwight Morrow. (App. C). Notably, the State Board examined the effect of termination not only at the time of the severance application, but also

several years earlier when the circumstances that precipitated the racial imbalance -- particularly Tenafly's tuition policy -- were adopted, and when termination would have decreased the white population at Dwight Morrow by approximately 6.5%. (App. C at 122a). Moreover, the State Board also agreed that Tenafly's tuition program had drained whites and Asians from Dwight Morrow and must be enjoined. (App. C at 129a).

The State Board held that while N.J.Stat.Ann. 18A:38-3 authorizes district boards to admit nonresident students with or without tuition, that statute -- enacted to ensure that the children of migrant workers and other children temporarily residing in New Jersey would be entitled to an education while in the state -- did not "create an absolute right for district boards to admit nonresident students on a tuition basis or otherwise." (App. C at 130a). The State Board then concluded that since N.J.Stat.Ann. 18A:38-3 involved the exercise of discretion by a district board, the Commissioner and the State Board both had the power and the responsibility to limit the exercise of that discretion where its exercise would thwart the State's overarching educational policy of encouraging racial balance and discouraging white flight. (Id. at 131a). The State Board not only enjoined Tenafly's tuition policy as to Englewood and Cliffs, but also directed the two districts to develop cooperatively a plan to encourage Cliffs students to attend Dwight Morrow. (App. Div. 134a). Moreover, the State Board expanded the injunction to prevent all public school districts in New Jersey from accepting Cliffs or Englewood students on a tuition basis to further assure that those public high school students would attend Dwight Morrow if they attend public school. (App. C at 133a).

Finally, the State Board refused to order regionalization as of the April 1990 date of its decision, but rather directed that the Commissioner monitor the progress of the districts and report back to the State Board annually for a period of

five years as to the implementation of the cooperative plan. When the Commissioner's first report revealed that the plan was not having the desired effect of reversing the trend of white migration from Dwight Morrow, the State Board directed that a regionalization study be conducted. Notably, the State Board's order directed the Commissioner to look at all potential configurations from kindergarten through high school and was not limited to the three districts involved in the litigation. (App. B at 51a to 52a). Cliffs then appealed to the New Jersey Superior Court, Appellate Division, from the State Board's orders 1) denying severance of the sending-receiving relationship, 2) enjoining all public schools from accepting tuition students from Cliffs, and 3) directing that a regionalization study be performed. Englewood cross-appealed from the Board's refusal to order regionalization based upon the existing administrative record. The Appellate Division stayed the regionalization study pending completion of its review of the case on the merits.

C. New Jersey State Court Decisions

On June 15, 1992, the Appellate Division affirmed the decisions of the State Board, noting that they were based upon sufficient credible evidence in the lengthy factual record (App. B). Indeed, the Appellate Division agreed that severance would have a substantial negative impact on Dwight Morrow, finding that conclusion "unassailable" (Id. at 66a). The Appellate Division also rejected Cliffs' contention that denying severance violated Cliffs' equal protection rights under the Fourteenth Amendment to the United States Constitution:

> What is at issue here is an administrative adjudication based upon legislatively intertwined concepts of the quality of education and the racial composition of the schools in question. Is it race

> conscious as Cliffs contends? The answer is yes. Is race consciousness prohibited? The answer is no. It is only the per se use of race as a determinant which creates a classification subject to strict scrutiny under the Fourteenth Amendment. [App. B at 71a].

The Appellate Division also rejected Cliffs' reliance on several decisions of this Court such as City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); and Regents of the University of California v. Bakke, 438 U.S. 265 (1978), which all involved invalidating absolute racial preferences in a zero-sum context (App. B at 69a). It not only saw no connection between the case before it and the cases cited by Cliffs, but characterized Cliffs' assertion that the "State Board attempted to reserve places for whites at DMHS in order to reduce minority representation" as a "distortion" of reality. (Id. at 72a).

The Appellate Division concluded, in fact, that the only possible classification which existed was geographical, not racial, especially since the injunction precluded other districts from accepting any Cliffs student, regardless of race (Id. at 73a). Accordingly, it concluded that the proper standard to be applied, and one which the State Board decision met, was the rational basis test which only required "some reasonable connection between a legitimate state interest and the action taken." (Ibid.) The court added, however, that even under heightened scrutiny the State Board's actions would still pass constitutional muster because they were amply supported by the compelling State interest in fostering diversity in the public schools and were properly and narrowly tailored to the circumstances presented. (Ibid.)

As to the State Board's injunction, the Appellate Division reaffirmed the breadth of the Commissioner and State Board's constitutional and legislative powers concerning public education, including their ability to order injunctive relief when necessary. (App. B at 77a to 79a). The court found that "Tenafly not only 'lured' and 'enticed' Cliffs' students by its 'beggar-thy-neighbor' policy, and in doing so siphoned off a disproportionate number of high achievers, but also attracted white and Asian Englewood students." (Ibid.) Given these facts, the court ruled that an injunction was not only authorized against Tenafly, but compelled. Moreover, as to the other school districts (none of which complained), the Appellate Division concluded that the injunction was a necessary adjunct to the restraints against Tenafly. Without the broader injunction, the court ruled, "the State Board could not ensure total compliance with the educational goals it sought to achieve. Most importantly, the injunction was a critical element of the State Board's attempt to remedy the problem at DMHS by using the least intrusive means." (Id. at 78a to 79a).

As to regionalization of the three districts, the Appellate Division upheld the State Board's authority to study the remedy and concluded that the necessity for further study was evident. The court then dissolved the stay of the study. Cliffs and Tenafly thereafter sought and were granted certification by the New Jersey Supreme Court to review the Appellate Division's decision. Englewood cross-petitioned from the court's determination not to order regionalization based on the existing record.

On June 9, 1993, the New Jersey Supreme Court affirmed the judgment of the Appellate Division, "substantially for the reasons set forth" in the lower court's 'comprehensive opinion.'" (App. A at 3a). The New Jersey Supreme Court specifically upheld the State Board's authority to conduct a regionalization study, although it found it unnecessary at this juncture to consider whether

regionalization was an appropriate administrative or judicial remedy in this case. (Ibid.) Based upon both New Jersey judicial decisions, the Commissioner has proceeded with the regionalization study, which remains ongoing at the present time.

D. This Petition

After the judgment of the New Jersey Supreme Court was issued, Cliffs filed a petition for certiorari with this Court, claiming that both the injunction and the denial of severance violated the equal protection clause and trying -- as it had tried unsuccessfully below -- to transform this state administrative matter into a reverse discrimination case or a federal desegregation matter. The circumstances here do not, however, fit within either of those "shoes". Lost amidst Cliffs' rhetoric alleging that the State Board decision treated Cliffs' students as "tools" to achieve more desirable racial balance at Dwight Morrow and Cliffs' protestations of innocence of discriminatory motives are several important facts. First, Cliffs initiated this litigation by seeking to sever long-term ties with Englewood. In response, the State Board applied State statutory standards and sound educational policy in denying severance. Moreover, this case is not an inter-district case despite Cliffs' claims to the contrary, because it involves districts that voluntarily used the same high school for more than twenty years and the State Board's efforts to reinforce that pre-existing agreement. Finally, this case is not a reverse discrimination case because a free public education is guaranteed to all students, the State Board orders applied to all high school students in Cliffs and Englewood regardless of race, and no quota of any sort was imposed. What this case does represent, however, is an effort by Cliffs to involve this Court in a state administrative decision based on sound educational policy and driven by concerns for educational quality and a desire not to condone white flight from one public school to another. Certiorari should thus be denied.

REASONS FOR DENYING THE PETITION

This litigation has already lasted for almost eight years and remains ongoing at the state administrative level where the New Jersey Department of Education is currently studying the advisability of directing the merger of the Englewood and Cliffs districts, and perhaps others, to address the racial balance and educational quality concerns that have arisen in this case. Certiorari should be denied, therefore, because this matter is not final within the meaning of 28 U.S.C. §1257, because the Cliffs Board lacks standing to raise the equal protection claims of its students, and because the sensitive educational issues at the heart of this case are best left to state education administrators to decide. That was the conclusion of the New Jersey courts, and should likewise be the conclusion of this Court because the only federal questions raised by Cliffs -- that the State Board orders violate the equal protection rights of Cliffs' students -- are totally lacking in foundation. Despite Cliffs' efforts to portray this case as a reverse discrimination matter, the Cliffs students -- the purported classification -- are not exclusively white and have suffered no harm other than their assignment to Dwight Morrow, a fully accredited high school, in keeping with the longstanding sending-receiving relationship between Cliffs and Englewood. As to Cliffs' claim that this Court's desegregation precedents apply, that argument is likewise divorced from the reality of this case which was initiated by Cliffs itself and which involves the efforts by New Jersey education administrators to apply state statutory standards governing sending-receiving relationships to the circumstances of this case.

1. Since the Judgment of the Supreme Court of New Jersey Is Not Final Under 28 U.S.C. §1257, This Court Should Deny Certiorari For Lack of Jurisdiction.

The jurisdiction of the Supreme Court to review a state court decision is generally limited to "[f]inal judgments or decrees rendered by the highest court of the State in which decision could be had ...." 28 U.S.C. §1257. The judgment of the New Jersey Supreme Court below in part upheld the right of the State Board to order the Commissioner to conduct a regionalization study examining the feasibility and advisability of merging the Cliffs and Englewood districts, and perhaps others, in an effort to resolve the racial balance and educational quality issues posed by this case. The study was the State Board's response to Englewood's cross-petition seeking regionalization of the districts and to the Commissioner's first annual report of the lesser remedies originally ordered by the State Board (i.e. the cooperative planning effort and the injunction) which had not had any discernible remedial effect. The study remains ongoing and will likely result in further administrative and judicial proceedings. The judgment which is the subject of this petition is consequently not final under 28 U.S.C. §1257.

The finality requirement serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Article III; and (3) it limits federal review of state court determinations of federal constitutional issues to minimize federal intrusion in state affairs. North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156, 159 (1973). See also Flynt v. Ohio, 451 U.S. 619, 621 (1981) (dismissing writ of certiorari because it appeared that in addition to federal issues raised in petition, other federal issues would be involved in trial court proceeding, thus

there was probability of piecemeal review); Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 70-71 (1948) (dismissing appeal because the "fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation."); Minnick v. California Dep't of Corrections, 452 U.S. 105, 120 (1982) (dismissing writ of certiorari because Court was "not persuaded that the outcome of further proceedings in the trial court ... will not have a significant effect on the federal constitutional issues presented by the certiorari petition.").

Englewood's cross-petition for regionalization has always been a key feature of this litigation; indeed, it is being examined as the possible ultimate remedy to the entire case. Cliffs and Tenafly opposed regionalization vehemently below and undoubtedly would continue that fight while Englewood has been similarly adamant in seeking this remedy. Review of this case at this time would thus clearly invite piecemeal adjudication. Moreover, should regionalization be ordered, Cliffs may raise state and federal constitutional objections similar to the issues raised in this petition. In fact, merger of the districts would likely prompt Cliffs to raise yet again its inter-district remedy arguments under the Fourteenth Amendment, albeit in the guise of challenging the merged districts.

In addition, New Jersey's education officials have not had their final say about the future configuration of the districts now before this Court. Refusing review here would thus minimize federal intrusion in state affairs -- one goal of the finality doctrine noted in North Dakota Pharmacy Bd. v. Snyder's Stores, supra, 414 U.S. at 159. Given these circumstances, the exceptions to the finality doctrine set forth in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975), simply do not apply. Certiorari should thus be denied.

2. The Board of Education of Englewood Cliffs Lacks Standing To Raise Equal Protection Claims on Behalf of Students In Its District.

A careful review of Cliffs' petition reveals that it is trying to vindicate the constitutional rights of its students rather than redress any injury to the board of education itself. Cliffs thus lacks standing to raise equal protection claims in this Court.

First, as a general rule a political subdivision of a state cannot invoke the protection of the Fourteenth Amendment against its creator, the state. See, e.g., Williams v. Mayor & City Council of Baltimore, 289 U.S. 36 (1933); City of Newark v. New Jersey, 262 U.S. 192 (1923); City of Trenton v. New Jersey, 262 U.S. 182 (1923). These precedents have been applied in lower federal courts to prevent school districts from asserting equal protection rights against the states that created them. Delta Special School District v. State Board of Education, 745 F.2d 532, 533 (8th Cir. 1984) (school district denied standing to sue State Board of Education under the Fourteenth Amendment concerning state statute which denied the district the right to appeal State Board decisions on transfer requests by students); Triplett v. Tiemann, 302 F. Supp. 1239, 1242 (D. Neb 1969) (equal protection clause held to have no application to acts of a State Board of Education against its own political subdivision).

Moreover, in order to invoke this Court's jurisdiction a party must meet the case or controversy requirement of Article III, which requires that the party show 1) that he or she personally has suffered some actual or threatened injury from the allegedly illegal conduct of the other party; 2) that the injury fairly can be traced to the challenged action; and 3) that the injury is likely to be

redressed by a favorable decision. Valley Forge Christian College v. Americans United, Etc., 454 U.S. 464, 471-472 (1982). The injury alleged must be "real and immediate," not conjectural or hypothetical. O'Shea v. Littleton, 414 U.S. 488, 494 (1974), quoting Golden v. Zwickler, 394 U.S. 103, 109-110 (1969).

Cliffs lacks standing here, therefore, because -- as a local board of education -- it cannot sustain injury from the State Board of Education under the equal protection clause. As a local political subdivision, it should not be permitted to sue the state which created it in federal court.[2] In addition, the Cliffs Board has not alleged any direct harm to itself from the State Board's actions, but rather has claimed only that the State Board's decisions violated the equal protection rights of Cliffs students. Where the local board itself suffers no injury, standing is lacking. Compare Board of Education v. Allen, 392 U.S. 236, 241 n.5 (1968) (standing permitted to allow local school board to challenge state statute that required public schools to lend textbooks to other schools, including parochial schools, where compliance would force board members to take allegedly unconstitutional action under the First Amendment; direct injury to board members found).

The State Board's decisions in this case represent a reaffirmation of the contractual agreement the parties voluntarily entered over twenty-five years ago. Surely they did not cause any direct injury to the Cliffs board that can be redressed under the equal protection clause. Certiorari

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[2] The fact that this case was heard by the New Jersey Supreme Court, and that the State Board conceded Cliffs' standing as a matter of State law, does not necessarily grant Cliffs standing for its claims in this Court. Indeed, the Supreme Court has recognized that the constraints of Article III do not apply to state courts, so that state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability, even when state courts address issues of federal law. Asarco v. Kadish, 490 U.S. 605, 617 (1989).

should be denied, therefore, because Cliffs lacks standing to raise the federal claims it has attempted to put before this Court.

3. The New Jersey Courts Properly Concluded That No Equal Protection Violation Occurred Here.

The New Jersey Legislature authorized the New Jersey Commissioner of Education to oversee sending-receiving relationships between districts, and directed the Commissioner to take into account, among other factors, the impact of severance on the racial composition of the districts. The Commissioner, the State Board, and the state courts thus properly considered racial balance as a factor in deciding that severance of the relationship between Cliffs and Englewood was not warranted. Notably, neither in this petition nor in the proceedings below did Cliffs question the Legislature's right to use the racial composition of affected schools as a legitimate factor in analyzing sending-receiving relationships. That omission is telling, because this Court has long recognized that in our imperfect society states may -- and sometimes must -- take race into account in decision-making. See, e.g., Shaw v. Reno, 113 S.Ct. 2816, 2824 (1993).

In fact, several justices of this Court have recognized the "unquestioned legitimacy" of certain race-conscious public policy goals analogous to the goal of improving racial balance at Dwight Morrow. In Regents of the University of California v. Bakke, 438 U.S. 265, 311-313 (1978), Justice Powell noted that a racially diverse student body "clearly is a constitutionally permissible goal for an institution of higher education." See also Id. at fn. 48, quoting former President William Bowen of Princeton University who praised the informal learning that occurred among students that were part of a diverse student body. To similar effect are Justice Stevens' observations in City of

Richmond v. J.A. Croson Co., 488 U.S. 469, 511-513 (1989), that race-based decisions such as those fostering an integrated police force or an integrated faculty may produce tangible and fully justified future benefits to integrated communities and integrated student bodies. Accord, Metro Broadcasting, Inc. v. F.C.C., 110 S.Ct. 2997, 3028 (1990) (Stevens, concurring). The majority opinion in Metro Broadcasting struck a similar theme when it noted that, "Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated ... [citing Bakke] ... the diversity of views and information on the airwaves serves important First Amendment values." 110 S.Ct. at 3010 Notably, the Court also found that the benefits of such diversity were not limited to minority groups who purchase stations under the F.C.C. minority ownership program, but extend to all members of the viewing and listening audience. Id. at 3011. And, even earlier, in Swann v. Charlotte-Mecklenberg Bd. of Ed., 402 U.S. 1, 16 (1971), former Chief Justice Warren Burger noted for the majority that school authorities might properly conclude that a racially balanced student body would help "prepare students to live in a pluralistic society," and "[t]o do this as an educational policy is within the broad discretionary powers of school authorities..."

Cliffs has not articulated why the State Board's application of the sending-receiving statute violates equal protection principles when the statute on its face does not. Indeed, a review of the record demonstrates that the school authorities applied the law just as it was written to prevent exacerbating racial imbalance in the student population at Dwight Morrow by reaffirming the existing agreement -- the status quo -- between Cliffs and Englewood. That such action could violate the equal protection clause would turn the Fourteenth Amendment on its head, as the State courts found below.

New Jersey's school authorities applied sound educational policies based on State statutory law in preventing severance and enjoining other districts from interfering in the sending-receiving relationship between Cliffs and Englewood. The decisions of school officials affected all of the students in both districts, all of whom were guaranteed a free public education. While racial balance was one of the goals sought to be achieved, no quotas were imposed, nor were any strictly race-based classifications used to apportion benefits and burdens. Simply put, this case is not a reverse discrimination matter where white students are denied access to benefits by an unyielding racial quota.

Nor is it a federal desegregation matter where this Court has carefully limited the provision of inter-district relief by federal courts to inter-district intentional, de jure discrimination. See, e.g. Milliken v. Bradley, 418 U.S. 717 (1974); Freeman v. Pitts, 112 S.Ct. 1430 (1992). Here the state courts affirmed the decisions of state educational authorities as to which public high school students in Cliffs should attend as a result of litigation initiated by Cliffs. Nothing in Milliken or Freeman requires a result different from the one ordered below. Certiorari is consequently unwarranted and should be denied.

CONCLUSION

For all of the foregoing reasons, the State Board of Education of the State of New Jersey requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Dated: November 5, 1993

BEST AVAILABLE COPY

No. 93-373

NOV 5 1993

In The

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD AND THE STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Respondents,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD

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QUESTIONS PRESENTED

1. Should the Court deny certiorari where the decision below is not a final decision?

2. Should the Court deny certiorari where state education officials are studying whether to regionalize the school districts involved in this case, and where new remedies that could be ordered after completion of that study may fundamentally alter the relationship among these districts and render petitioner's issues moot?

3. Should the Court deny certiorari where the Court's own precedents are inconsistent with petitioner's standing?

4. Should the Court deny certiorari where the petition substantially distorts the case?

5. Should the Court deny certiorari because the federal question presented is insubstantial, lacks merit, and was correctly determined below?

6. Should the Court deny certiorari where the petitioning board of education has contributed to *de jure* school segregation and is seeking the Court's discretionary assistance to advance petitioner's segregationist goals?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of Lack of Jurisdiction	1
Additional Constitutional Provisions Involved	1
Statement of the Case	1
A. Additional Procedural History Demonstrates That There Is No Final Decision.	1
B. The Communities And The Schools.	3
C. The Sending/Receiving Relationship.	4
D. Petitioner Has Facilitated White Flight With The Assistance Of The Tenafly Board's Pernicious Private Tuition Policy. Segregation Here Is *De Jure* As Well As *De Facto*.	5
E. The Decisions Below.	6
Reasons For Denying The Writ	7
I. Certiorari Should Be Denied Because The Court Lacks Jurisdiction And Because Of Jurisprudential Considerations.	8

Contents

Page

A. The Court Lacks Jurisdiction Because The Decision Sought To Be Reviewed Is Not Final. 8

B. Petitioner Lacks Standing. 12

C. The Court's Traditional Reluctance To Interfere With Local Education Matters Counsels Against The Grant Of Certiorari. . . 14

II. Certiorari Should Be Denied Because There Are No "Special And Important Reasons" To Grant It. 15

A. This Case Does Not Present The Question Posed By The Petition. 15

B. There Is No Substantial Federal Question And No Conflict With Decisions Of This Court. . . 16

III. Certiorari Should Be Denied Because The Petition Is Substantially Inaccurate. 18

Conclusion 21

TABLE OF CITATIONS

Cases Cited:

Akron Bd. of Educ. v. State Bd. of Educ., 490 F.2d 1285 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974) 14

Contents

Page

Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, 257 N.J. Super. 413, 608 A.2d 914 (App. Div. 1992), *aff'd per curiam*, 132 N.J. 327, 625 A.2d 483 (1993) 2

Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965) 4, 16

City of Newark v. New Jersey, 262 U.S. 192 (1923) 13

City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989) 16

City of Trenton v. New Jersey, 262 U.S. 182 (1923) 13

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ... 10

Dore v. Bedminster Tp. Bd. of Educ., 185 N.J. Super. 447, 449 A.2d 547 (App. Div. 1982) 7

Flynt v. Ohio, 451 U.S. 619 (1981) 10, 11

Gwinn Area Community Schools v. Michigan, 574 F. Supp. 736 (W.D. Mich. 1983), *modified on other grounds*, 741 F.2d 840 (6th Cir. 1984) 13

In re Kallen, 92 N.J. 14, 455 A.2d 460 (1983) 7

Jenkins v. Township of Morris Sch. Dist., 58 N.J. 483, 279 A.2d 619 (1971) 4, 7, 13, 16

Contents

Page

Norwood v. Harrison, 413 U.S. 455 (1973) 16

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 10, 11

Regents of The Univ. of California v. Bakke, 438 U.S. 265 (1978) 16

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 8, 10, 11, 12

Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979) 14

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 11, 14

San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981) 10

Shaw v. Reno, 509 U.S. __, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) 17

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 12, 13

Williams v. Mayor of Baltimore, 289 U.S. 36 (1933) 13

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 16

Contents

Page

Constitution Cited:

N.J. Const., Art. I, para. 5 ..... 1, 4

N.J. Const., Art. VIII, Section IV, para. 1 1

Statutes Cited:

28 U.S.C.A. § 1257(a) 8

N.J. Stat. Ann. § 18A:38-3 20

N.J. Stat. Ann. § 18A:38-11 4

N.J. Stat. Ann. § 18A:38-13 4

N.J. Stat. Ann. § 52:14F-7 7

Court Rules Cited:

Supreme Court Rule 10.1. 5

Supreme Court Rule 14.5 ..... 6, 18

Supreme Court Rule 15.1 ..... 6, 18

Other Authority Cited:

Stern, Gressman, Shapiro, *Supreme Court Practice* (6th ed. 1986) 8, 12

Contents

Page

APPENDIX

Appendix A — Notice of Motion for Leave to Appeal, filed by Petitioner in the New Jersey Supreme Court on or about July 15, 1992 ..... 1a

Appendix B — Notice of Motion for Leave to Appeal and for a Stay, filed by Respondent Tenafly Board of Education on or about July 15, 1992 ..... 5a

Appendix C — Orders of the New Jersey Supreme Court Granting the Motions For Leave to Appeal, filed on November 5, 1992 ..... 7a

Appendix D — July 3, 1991 Resolution of the New Jersey State Board of Education Ordering a Regionalization Study 9a

Appendix E — Petitioner's June 2, 1993 Submission to the State Board of Education Regarding the Regionalization Study 12a

Appendix F — Part VI of the Opinion of the Appellate Division of the New Jersey Superior Court, Excerpted from Petitioner's Appendix (pp. 68a-77a) 14a

STATEMENT OF LACK OF JURISDICTION

This Court lacks jurisdiction because the decision sought to be reviewed is not final. In addition, petitioner lacks standing. *See* Point I.

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

New Jersey Constitution, Article I, paragraph 5:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

New Jersey Constitution, Article VIII, Section IV, paragraph 1:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

STATEMENT OF THE CASE

A. Additional Procedural History Demonstrates That There Is No Final Decision.

Petitioner's statement of procedural history is incomplete in

crucial respects. The case came before the New Jersey Supreme Court on leave to appeal, granted to review an interlocutory order requiring a regionalization study, as well as on certification; the appeals were related and consolidated. Ra 1-8; *see* Pa 10.[1] The New Jersey Supreme Court decision sought to be reviewed by this Court affirmed, among other things, the interlocutory "order requiring a regionalization study. . . ." Pa 3.[2]

The study was originally ordered by the New Jersey State Board of Education ("State Board") on July 3, 1991, while appeals of its April 4, 1990 decision were pending in the Appellate Division of the New Jersey Superior Court ("Appellate Division"). Pa 10. Recognizing that the study order was not a final order, petitioner sought and obtained that court's leave to appeal an interlocutory order. *Id.*

The interlocutory study order provides that "a regionalization study now be conducted to explore the potential for establishing a regional school district. . . ." Ra 11. The study is ongoing. Petitioner is participating and raising some of the same points it urges here; *e.g.*, a magnet school remedy. *Compare* Ra 12-13, with Petition ("Pet.") at 24. To date, there has been no study result and no final decision by the State Board or the New Jersey courts as to whether the three districts should be regionalized.

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1. "Ra" refers to Respondent's Appendix, annexed hereto. "Pa" refers to the Appendix to the Petition.

2. The last two opinions below have been published. *Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood*, 257 N.J. Super. 413, 608 A.2d 914 (App. Div. 1992), *aff'd per curiam*, 132 N.J. 327, 625 A.2d 483 (1993). They are also contained in the Appendix to the Petition ("Pa"). Citations to the opinions below herein are to that Appendix ("Pa").

B. The Communities And The Schools.

Englewood is a heterogeneous and relatively affluent urban community. Pa 11. Its neighbors, suburban Englewood Cliffs and Tenafly, are more affluent, but much less diverse; they are "primarily white with growing Asian populations." *Id.*

Dwight Morrow High School ("DMHS") is Englewood's public high school. It is a "*very* good school," Pa 64 (emphasis in original), which "more than adequately prepares its students for college and later life." Pa 124. However, due to the actions of petitioner Board of Education of the Borough of Englewood Cliffs, in conjunction with respondent Board of Education of the Borough of Tenafly ("Tenafly Board"), as well as to demographic changes, Pa 205, n.4, DMHS is racially imbalanced. In 1987-88, the last year of record evidence, its student population was 11.8% white, 66.2% black, 17.8% Hispanic, and 3.9% Asian. Pa 19. DMHS has a racially balanced faculty. Pa 13 (61% white, 32% black and 6% Hispanic or Asian).

Tenafly High School ("THS") is only 2.4 miles away from DMHS, Pa 260, but the two schools are worlds apart in terms of diversity. The THS faculty of 87 is "characterized by a lack of ethnic diversity . . . ," Pa 15, with no black teachers and only one Hispanic and one Asian teacher. Pa 216. In 1987-1988, the THS student body was 80.7% white, 17.8% Asian, 0.9% Hispanic and 0.6% black. Pa 21. Although petitioner claims that THS is a superior school, that claim has been soundly rejected by New Jersey education officials and the courts below. *See, e.g.*, Pa 64 (criticizing the THS "formula for educational success," and finding that THS "is not a realistic forum for interaction among the children of different races.")

C. The Sending/Receiving Relationship.

A sending/receiving relationship is a creature of state statutory law. *N.J. Stat. Ann.* §18A:38-11; Pa 59. By way of example, a community that is too small to have its own public high school (the "sender"), enters into a relationship with a district that operates a high school (the "receiver"), and the receiver's high school becomes the public school for the sender's students. *Id.* Due in part to the need for stability, Pa 59-60, a sending/receiving relationship cannot be terminated without the approval of New Jersey's Commissioner of Education ("Commissioner"). *N.J. Stat. Ann.* §18A:38-13.

When sending districts apply for termination, the Commissioner must make "equitable determinations based upon consideration of all the circumstances, including . . . the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts." *Id.; see also* Pa 61. A "long-standing" and "vigorous" state constitutional policy "against racial discrimination and segregation in the public schools . . . ," *Booker v. Board of Educ.*, 45 N.J. 161, 173-174, 212 A.2d 1, 8 (1965); *see* N.J. Const., Art. I, para. 5, also limits termination of sending/receiving relationships. *Jenkins v. Township of Morris Sch. Dist.*, 58 N.J. 483, 279 A.2d 619 (1971).

DMHS became the public high school for Englewood Cliffs when petitioner entered into its sending/receiving relationship with the Englewood district almost thirty years ago. Pa 16. This case began when petitioner applied to the Commissioner to terminate that relationship and to create a new one with the Tenafly district, so that THS would become Englewood Cliffs' public high school. Pa 7.

D. Petitioner Has Facilitated White Flight With The Assistance Of The Tenafly Board's Pernicious Private Tuition Policy. Segregation Here Is *De Jure* As Well As *De Facto*.

Despite the hypocritical posturing that runs throughout the petition, petitioner is not an "innocent." *See, e.g.*, Pet. at 10. It has encouraged and facilitated white flight from DMHS. It has caused and exacerbated racial imbalance. Petitioner's assertion that its community is motivated by legitimate educational concerns, Pet. at 5, 8, is cynically false. As the Commissioner flatly put it: "no one could seriously believe that racial prejudice and circumvention of integration is not at play in this case." Pa 42.

The evidence of prejudice in Englewood Cliffs includes "compelling" testimony that Englewood Cliffs students regularly refer to Dwight Morrow High School as "Black Morrow" and "Dwight Nigger." Pa 22, 209. Pursuant to its sending/receiving relationship, petitioner had an "obligation to . . . encourage its students to attend their designated receiving school . . . ," DMHS, but it instead facilitated and exacerbated their white flight. Pa 134; *see also* Pa 66 (referring to "Cliffs' failure since 1982 to encourage its students to attend DMHS"). Petitioner and its employees encouraged Englewood Cliffs students to cross district lines to attend THS, a private school to them, by, among other things, taking "a favorable view towards" Tenafly's private tuition program. Pa 115. They also provided written instructions detailing how to apply to THS, although they provided no such instructions for any other "private" school. Pa 18, 115. Petitioner also has encouraged white flight by its wholly unfounded attack on the quality of DMHS, which continues to this day in the petition before the Court, despite strong and unanimous rejection by the five decisionmakers below. *See, e.g.*, Pa 64, 39-40.

Respondent Tenafly Board abetted Englewood Cliffs' white flight and caused racial imbalance at DMHS by its highly selective

and "novel" private tuition policy. Pa 32. The Tenafly tuition policy "lured" and "enticed" primarily affluent white and Asian students from DMHS, thereby "subverting that school's efforts to promote racial balance . . . ," and seriously undermining "the continuing ability of the Englewood district to provide equal educational opportunity to all its students." Pa 78, 32-33, 20; *see also* Pa 48, 66, and 78 (there is a "direct relationship" of "cause and effect" between the tuition policy and racial imbalance at DMHS).

With the tuition policy, petitioner and the Tenafly Board created, and encouraged the use of, their own interdistrict "remedy" in order to circumvent the sending/receiving relationship. Seeking a racially segregated education for Englewood Cliffs children, petitioner urged the Commissioner to sanction a prejudiced purpose, but the Commissioner, the State Board, and New Jersey's courts refused.

This Court should not act otherwise. It should not be misled by petitioner's misrepresentations. For example, at page 17, petitioner falsely alleges: "Neither the State Board nor the New Jersey courts found active or passive racial discrimination by any unit of government, and certainly not by Cliffs." To the contrary, New Jersey's appellate courts found that *de jure* segregation is "the leitmotif which runs throughout the decisions here." Pa 75-76.[3]

E. The Decisions Below.[4]

All five decisionmakers below applied state statutory and

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3. There are other blatant mischaracterizations in the petition. Pursuant to respondent's obligation to bring them to the Court's attention, Sup. Ct. R. 15.1, they are detailed in Point III, *infra*. The pervasiveness of petitioner's inaccuracy is reason enough, of itself, to deny the petition. Sup. Ct. R. 14.5.

4. Because petitioner heavily relies upon findings by an administrative (Cont'd)

constitutional law to reject petitioner's plea to terminate the sending/receiving relationship because of substantial negative impacts on educational quality and racial balance. *See, e.g.*, Pa 59-68; 3 (affirming "substantially for the reasons set forth in" the Appellate Division's opinion). Similarly, all decisionmakers concluded that an injunction was warranted and necessary. *See, e.g.*, Pa 77-79.

In addition, the Commissioner and the State Board, New Jersey's highest education authority, ultimately concluded that those minimally intrusive remedies would not likely eliminate segregation. The Commissioner recommended, and the State Board ordered, the regionalization study that is now in process. Pa 86. Within the context of this litigation, Pa 84-89, the State Board is now considering whether to regionalize — whether to merge — the three litigating districts to achieve racial balance, pursuant to state constitutional policy and precedent. *Jenkins*, 58 N.J. 483, 279 A.2d 619 (regionalization is a state constitutional remedy for segregation.)

REASONS FOR DENYING THE WRIT

In this school segregation case, petitioner turns the Fourteenth Amendment "on its head," Pa 77, seeking federal constitutional sanction for removal of its resident children from a predominantly black public school in order to send them to a predominantly white

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(Cont'd)

law judge ("ALJ"), it is appropriate to note the significant limitations on a New Jersey ALJ's authority. Pursuant to New Jersey law, ALJs make only recommendations to state agencies; they have no independent decisional authority. *In re Kallen*, 92 N.J. 14, 20-23, 455 A.2d 460, 462-464 (1983); *N.J. Stat. Ann.* § 52:14F-7. In considering an ALJ's recommendation, both the Commissioner and the State Board (the agency head) have authority to find facts *de novo*, unfettered by the usual appellate standard of review. *Dore v. Bedminster Tp. Bd. of Educ.*, 185 N.J. Super. 447, 452, 449 A.2d 547, 550 (App. Div. 1982).

public school. This cynical proposition is presented by a petitioner that lacks standing in a proceeding that lacks finality.

The petition for certiorari is burdened with factual error, and is wrong as a matter of procedure, law, and public policy. It is a classic example of a petition that deserves denial.

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE COURT LACKS JURISDICTION AND BECAUSE OF JURISPRUDENTIAL CONSIDERATIONS.

A. The Court Lacks Jurisdiction Because The Decision Sought To Be Reviewed Is Not Final.

The threshold question presented by this petition for certiorari is whether there is sufficient finality to warrant review. 28 *U.S.C.A.* §1257(a). It is necessary to address this question in its factual context because, as to finality, there is no bright line. Stern, Gressman, Shapiro, *Supreme Court Practice* § 3.8, p. 124 (6th ed. 1986). As Justice Frankfurter put it: "No self-enforcing formula defining when a judgment is 'final' can be devised." *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 67 (1948). "The considerations that determine finality are not abstractions but have reference to very real interests — not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system." *Id.* at 69.

In this case, a state administrative agency and state courts adjudicated state constitutional and statutory issues. The decisions below dealt with three remedial requests, but disposed of only two. The decisions denied petitioner's request for severance of an existing sending/receiving relationship between Englewood Cliffs and Englewood, and for establishment of a new sending/receiving

relationship between Englewood Cliffs and Tenafly. The petition seeks review of this denial. Secondly, the decisions granted Englewood's request for ancillary injunctive relief, precluding Tenafly (and other districts) from undermining the existing sending/receiving relationship by accepting private tuition students from Englewood and Englewood Cliffs. The petition also seeks review of this ancillary remedy.

But the decisions below did not dispose of the third remedial request — Englewood's application for compulsory establishment of a high school regional district to include Englewood, Englewood Cliffs, and Tenafly. Rather, the administrative agency declined to order regionalization "at this juncture," Pa 137, and subsequently ordered "that a regionalization study now be conducted to explore the potential for establishing a regional school district. . . ." Ra 11. The Appellate Division considered the resulting regionalization arguments, Pa 79-89, and sustained the administrative agency: "We affirm the order denying regionalization at the present time, and we affirm the order for a regionalization study." Pa 89. The Appellate Division declined "to place specific time limits on the completion of this difficult task [the regionalization study]," but ruled: "If it appears that a further unreasonable delay is occurring during the study, any party may return to us to apply for a more definitive time table." Pa 88. The New Jersey Supreme Court affirmed "the authority of the State Board of Education to undertake such a regionalization study," but emphasized that it was expressing no view "on the administrative or judicial power to require inter-district regionalization." Pa 3.

The regionalization study is now proceeding with input from all three districts. *See, e.g.*, Ra 12-13. If it results in regionalization, the sending/receiving relationship would be superseded and the ancillary injunction may not be necessary. There would be a brand new configuration, as explained by the Appellate Division: "The effect of such a regional district here

would be to transfer control over DMHS and THS to a regional school board." Pa 79.

Thus, if the administrative agency orders regionalization and the state courts affirm, petitioner's equal protection challenge may well be raised again, albeit in a new factual and relational context. If, on the other hand, the administrative agency or the state courts deny regionalization, the remedial phase of this case will be complete, and review of the severance and injunction issues could be considered in the light of whatever new facts are adduced during the regionalization study process. Even if there were no finality rule, common sense would dictate postponement of consideration of certiorari until the remedial phase has been completed. But there is a finality rule to which we now turn.

Subject to limited exceptions, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487 (1975), none of which apply here (*e.g.*, *Cox* itself involved a potential chilling effect on freedom of the press), "the final-judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' " *Flynt v. Ohio*, 451 U.S. 619, 620 (1981), quoting from *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Three important reasons for the finality rule particularly apply to the facts of this case:

1. *Piecemeal review:* The final judgment rule is "[d]esigned to avoid the evils of piecemeal review. . . ." *Republic Natural Gas Co.*, 334 U.S. at 67; *see Flynt*, 451 U.S. at 621 (one finality issue was the "probability of piecemeal review with respect to federal issues"). The piecemeal review purpose is served by insuring that the remaining litigation does not "raise other federal questions that may later come here." *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 633 (1981), quoting from *Radio Station WOW, Inc.*,

326 U.S. at 127; *see Flynt*, 451 U.S. at 621 ("no other federal issues to be resolved"). Here, there is a significant likelihood that petitioner's equal protection claim will be recycled, in different factual and probably different relational circumstances, once New Jersey's administrative and judicial authorities have resolved the regionalization question and completed the remedial phase of this litigation. The "probability of piecemeal review with respect to federal issues," *Flynt*, 451 U.S. at 621, suggests denial of certiorari on finality grounds here.

2. *Judicial restraint:* "The policy against premature constitutional adjudications demands that any doubts . . . be resolved against jurisdiction." *Republic Natural Gas Co.*, 334 U.S. at 71. "[F]or the soundest of reasons we ought not to pass on constitutional issues before they have reached a definitive stop." *Id.* Here, there is not only the abstract caveat against precipitous constitutional adjudication, but the case-specific caution that judicial restraint will permit the Court to see this matter fully developed and in its final permutation.

3. *State-federal comity:* The final judgment rule "is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern." *Republic Natural Gas Co.*, 334 U.S. at 67. Public education, at issue here, is surely one of those matters of local concern. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973).

The final judgment rule precludes jurisdiction here because something "further remains to be determined by a State court" and it is not even "dissociated from" the federal issues already decided. *Flynt*, 451 U.S. at 620. The rule precludes jurisdiction also because its three purposes would be disserved by granting certiorari here. And the rule precludes jurisdiction because the only close precedent — *Republic Natural Gas Co.*, 334 U.S. 62 — suggests a lack of finality on the facts of the case at bar.

In *Republic Natural Gas Co.*, an Oklahoma administrative agency ruled, and the Oklahoma Supreme Court affirmed, that, under Oklahoma law, one company had to ratably take natural gas from another company's wells. Although this substantive point of law had thus been finally determined, the remedial phase of the case was not complete: "Republic is required to take ratably from Peerless, but it may do so in any one of three ways." 334 U.S. at 69. This remedial incompleteness prompted the Court to decline jurisdiction on the ground that there was no final judgment.

Citing *Republic Natural Gas Co.*, Stern, Gressman, Shapiro, *Supreme Court Practice* § 3.11, p. 135, pertinently states: "To be reviewable, an administrative order which has been reviewed by the highest state court must be the final adjudication *in a completed administrative process. . . .*" (Emphasis added). The administrative process in this case is not "completed." A regionalization study is ongoing. It may result in a regionalization order. The study will produce new facts that bear on the issues raised in the petition, and a regionalization order would reconfigure the relational pattern of the parties before the Court.

The judgment of which petitioner seeks review lacks finality. For this reason alone, certiorari should be denied.[5]

B. Petitioner Lacks Standing.

Petitioner is a school board, the governing body of a school district. Unlike school desegregation cases that typically come before this Court, *see, e.g., Swann v. Charlotte-Mecklenburg Bd. of*

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5. The Court need not be concerned about hardship to petitioner should review be denied for lack of finality. With regard to the two issues addressed in the petition, neither a stay, nor expedited review, was sought from the state courts. Petitioner should not be heard to complain now.

Educ., 402 U.S. 1 (1971), no parents or students are parties.[6]

In New Jersey, school districts are subdivisions of the state. *See, e.g., Jenkins*, 58 N.J. at 500, 279 A.2d at 629. Pursuant to this Court's precedents, state subdivisions may not challenge actions of their state creators on Fourteenth Amendment equal protection grounds. *City of Newark v. New Jersey*, 262 U.S. 192 (1923) (holding that a municipality may not challenge its state's action on Fourteenth Amendment equal protection grounds); *see also Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933) (same result regarding Fourteenth Amendment privileges and immunities); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923) (same result regarding Fourteenth Amendment due process clause). The rationale for the rule is:

> A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will.

Id. at 187. As Justice Cardozo succinctly stated: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams*, 289 U.S. at 40. This rationale applies equally to school boards, as to other governmental subdivisions. *See, e.g., Gwinn Area Community Schools v. Michigan*, 574 F. Supp. 736, 742-743 (W.D. Mich. 1983), *modified on other grounds*, 741 F.2d 840, 844 (6th Cir. 1984).

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6. Years ago, one parent, (R.S.), intervened on behalf of one student, (A.S.), to raise a narrow issue that has now become moot. Those parties are no longer in the case. Pa 9, n.1.

Some lower courts have attempted to distinguish this Court's precedents. *Rogers v. Brockette*, 588 F.2d 1057, 1067-1071 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285, 1289-1292 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974). But this Court has never recognized the asserted distinctions, which, in any event, are inapposite here.[7] Thus, pursuant to this Court's precedents, petitioner lacks standing to raise the issues it seeks to present. At the very least, there is substantial doubt and that doubt militates against the exercise of discretionary review.

C. The Court's Traditional Reluctance To Interfere With Local Education Matters Counsels Against The Grant Of Certiorari.

Because of a lack of "specialized knowledge" in, and "experience" with, local problems, this Court has historically been reluctant to prematurely interfere "with the informed judgments made at the state and local levels" about public education. *See, e.g., San Antonio Indep. Sch. Dist.*, 411 U.S. at 42. That reluctance should lead to a denial of certiorari here, where the challenged decision implicates educational policy judgments by state education officials, and particularly where interference would be premature given the State Board's ongoing remedial study of these very districts.

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7. Respondent knows of no case where the limits of standing were stretched so far as to permit a *public* board of education to champion the rights of students to attend *private* schools. Yet this is what petitioner seeks to do with its challenge to the injunction because any "public" high school other than DMHS is a "private" school to Englewood Cliffs residents (*e.g.*, parents pay private tuition; public monies cannot be used). *Cf.* Pa 19 (referring to Tenafly's tuition students as "private students").

II.

CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO "SPECIAL AND IMPORTANT REASONS" TO GRANT IT.[8]

A. This Case Does Not Present The Question Posed By The Petition.

The Petition poses essentially one question: may state courts order race-conscious interdistrict remedies for school segregation without findings or proof of *de jure* segregation? *See, e.g.*, Pet. at 10. In fact, that question is not presented by this case.

First, there are no interdistrict remedies. Maintaining the sending/receiving relationship merely keeps in place the district line of what is, under New Jersey law, a single school district for high school purposes. Pursuant to the statutory sending/receiving relationship, the attendance district for DMHS encompasses Englewood Cliffs as well as Englewood. In seeking to change that relationship, *petitioner* is attempting to redraw district lines. The injunction is a necessary ancillary remedy to maintenance of the existing sending/receiving relationship. It preserves current district lines. It prevents the Tenafly district and others from creating interdistrict arrangements that can be used to foster racial segregation. Although state education officials are now studying an interdistrict remedy (regionalization), to date they have not ordered one.

Second, as detailed in respondent's Statement of the Case, there are both evidence and findings of *de jure* segregation here. Although the New Jersey Constitution prohibits *de facto* as well as

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8. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1.

de jure segregation, *see Jenkins*, 58 N.J. at 506, 279 A.2d at 631-632; *Booker*, 45 N.J. at 170-171, 212 A.2d at 6, and the decision below would be justified by *de facto* segregation alone, there is far more to this case. There is acquiescence in, and active facilitation of, discrimination by two governmental entities — petitioner and the Tenafly Board. There is *de jure* segregation. *See City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 492 (1989) (the state can take "affirmative steps" to avoid becoming a "passive participant" in discrimination); *Norwood v. Harrison*, 413 U.S. 455, 466 (1973) (state education aid is unconstitutional "if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.") Indeed, as found below, *de jure* segregation is "the leitmotif which runs throughout the decisions here." Pa 75-76.

B. There Is No Substantial Federal Question And No Conflict With Decisions Of This Court.

This is a state law case that petitioner attempts to puff up into a federal constitutional controversy. The courts below applied only state law to find a state constitutional violation and fashion state constitutional remedies. The purported federal question was asserted by petitioner belatedly,[9] and only defensively. The mere assertion of a non-meritorious federal defense does not magically transform a state law case into a federal matter important enough to warrant certiorari.

In any event, the insubstantial federal defense has no merit. As found below: "No amount of ingenuity can bring this case within the interdiction of *Bakke*, *Wygant* and *Croson* which involved absolute racial preferences in a zero-sum context." Pa 72.

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9. Petitioner did not even raise the defense at the trial or before the Commissioner, although the Tenafly Board unsuccessfully raised a similar defense. Pet. at 4, 5.

The Appellate Division comprehensively dissected petitioner's argument in a concise analysis that has been affirmed by New Jersey's highest court. That analysis appears in petitioner's Appendix at pages 68-77, and for convenience is repeated in the Appendix to this brief at pages 14a-22a. By way of summary:

1. There is no racial classification here. At most, there may be a geographic classification that applies equally to all races (typical of public school attendance zones generally); *see* Pa 73, reproduced at Ra 18;

2. Thus, strict scrutiny is not warranted; *see* Pa 69-73, reproduced at Ra 15-18; and

3. In any event, the remedies would survive strict scrutiny because they are narrowly tailored, and there are compelling interests in diversity and in assuring that public monies do not finance private prejudice; *see* Pa 73-76, reproduced at Ra 19-21.

Respondent Englewood Board respectfully incorporates the Appellate Division's comprehensive analysis by reference, and defers to it for a full explanation of these points.[10]

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10. This Court's later decision in *Shaw v. Reno*, 509 U.S. ___, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993), does not assist petitioner. That case involved a bizarre apportionment that was an obvious "effort to segregate voters into separate voting districts because of their race. . . ." *Id.*, 509 U.S. at ___, 113 S. Ct. at 2832, 125 L. Ed. 2d at 536. There is nothing even close to that here — except for the petition itself, which does constitute an "effort to segregate."

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION IS SUBSTANTIALLY INACCURATE.

This point is included pursuant to respondent's "obligation to the Court" to point out "any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Sup. Ct. R. 15.1. Petitioner's misstatements are pervasive, and the result is substantial distortion of the case. This is an additional and independent reason for denying certiorari. Sup. Ct. R. 14.5. The primary[11] distortions are:

1. As delineated above, petitioner's statements proclaiming its innocence, *e.g.*, Pet. at 10 and 12, the absence of findings of "active or passive racial discrimination . . . ," *e.g.*, Pet. at 17, and the absence of "proof of discrimination . . . ," *e.g.*, Pet. at i, Question 2, and Pet. at 11, are false. Petitioner is not "innocent;" there are such findings; and there is ample proof. *See* Statement of the Case at D and Point IIA, herein.

2. Similarly, petitioner's statements that its actions and Tenafly's private tuition policy did not cause racial imbalance at DMHS are wrong. *See, e.g.*, Pet. at i, Questions 1 and 2; 8 ("The THS tuition plan had no demonstrable effect upon enrollment at DMHS); 17-18 (petitioner's action had no "substantial *inter*district effect;" emphasis in original). As noted in the Statement of the Case at D, there are findings of cause and effect. *See, e.g.*, Pa 48 ("The State Board concluded that there was a cause

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11. It would not be helpful to respond to every false statement and mischaracterization of evidence in the petition. Respondent does not waive its objection to the false statements in the petition that have little or no bearing on whether the Court should grant certiorari.

and effect . . ."); Pa 66 (referencing a "direct relationship of that policy to the accelerated decline in white enrollment at DMHS"); Pa 134 (petitioner facilitated white flight). The ALJ, whom petitioner cites again and again, was quite clear on this point: "Its [the tuition policy's] practical effect is to drain upper income white and Asian college-bound students from DMHS, subverting that school's efforts to promote racial balance and luring many of its most academically talented students." Pa 257.

3. Contrary to the petition, DMHS is a "*very* good school," Pa 64, (emphasis in original), and THS is *not* superior. Pet. at 8, 17. There are no "good faith educational concerns" about DMHS, Pet. at 5; *see also* Pet. at 11, and there would be no "benefits" of severance. Pet. at 8. Indeed, "every factfinder," Pa 64, rejected petitioner's "effort to cast DMHS as an inferior school. . . ." Pa 40. As to THS, its "formula for educational success" embraces segregation; it is "not a realistic forum for interaction among the children of different races." Pa 64. Even the ALJ, whose recommendations have been superseded by four subsequent decisions, but whom petitioner cites out of context when it has no other support, agreed. He found DMHS to be a high quality school, Pa 26, and that "Cliffs students who abandon DMHS would be losing a very enriching environment which they would be unable to duplicate at the more racially and socioeconomically homogenous THS." Pa 31.

4. Related to petitioner's false "poor quality" charge is another false theme that runs through the petition: that large numbers of Englewood whites have abandoned DMHS because of poor quality, but would return and solve the racial balance problem if DMHS would only become a quality school. *See, e.g.*, Pet. at ii, Question 5, and pages 4, 5, 7, 10, 11, 18, 23-24. This argument was advanced by petitioner, *and rejected,* at every level below. *See, e.g.*, Pa 68 n.7; Pa 138 (". . . there is nothing in the record to indicate that the proportion of the high school age population of

Englewood attending private or parochial school increased during the period relevant to this litigation.") Petitioner presented no competent evidence to support its claim, and the Englewood Board disproved the claim with expert demographic evidence. The Englewood Board proved, and the decisionmakers below found, that the causes of racial imbalance are Tenafly's private tuition policy and petitioner's facilitation of white flight, as well as demographic changes, *e.g.*, Pa 205 n.4; pages 170 and 185-190 of respondent's Appellate Division Appendix below further support this point with expert demographic evidence. *See also*, numbered point 2, above.

5. Contrary to the petition at page 9, New Jersey students have no right or "opportunity . . . to attend any public high school on a tuition basis. . . ." *See also* Pet. at 11, to the same erroneous effect. New Jersey has no statewide "statutorily authorized choice" program. *Cf.* Pet. at 8. The State Board correctly found that N.J. Stat. Ann. § 18A:38-3, the statute upon which petitioner relies, "does not confer on parents the right to select from among the public school districts other than their district of residence. . . ." Pa 133. The statute merely allows districts to accept non-resident students, as long as they do not violate the constitution or other law (as did Tenafly here); it does not require acceptance of nonresidents. Indeed, Tenafly applied "selective entry requirements," Pa 32, and rejected non-resident students who failed to meet them. *See, e.g.*, Pa 251 (Tenafly was primarily "interested in healthy applicants with good grades and good attendance records.")

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent
Board of Education of the
City of Englewood

Dated: November 5, 1993

APPENDIX A — NOTICE OF MOTION FOR LEAVE TO APPEAL, FILED BY PETITIONER IN THE NEW JERSEY SUPREME COURT ON OR ABOUT JULY 15, 1992

HELLRING LINDEMAN GOLDSTEIN & SIEGAL
Attorneys for Board of Education of the
Borough of Englewood Cliffs
1180 Raymond Boulevard
Newark, New Jersey 07102-4178
(201) 621-9020

SUPREME COURT OF NEW JERSEY

DOCKET NO. 35,501

Civil Action

On Appeal from the June 15, 1992 Opinion of the Superior Court of New Jersey, Appellate Division, Docket Nos. A-6384-90T5F; A-6385-90T5F; A-4912-89T5 (Consolidated)

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner-Cross-Respondent/Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent-Cross-Petitioner/Cross-Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Cross-Respondent/Appellant.

Appendix A

NOTICE OF MOTION FOR LEAVE TO APPEAL

TO: Clerk, Supreme Court
Hughes Justice Complex
CN-970
Trenton, New Jersey 08625

Clerk, Appellate Division
Hughes Justice Complex
CN-009
Trenton, New Jersey 08625

James S. Rothschild, Esq.
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Robert J. Del Tufo
Attorney General of New Jersey
Attention: Marlene Zuberman
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7th Floor, West Wing
Trenton, New Jersey 08625
Attorneys for State Board of Education

Appendix A

Stephen M. Eisdorfer
Assistant Deputy Public Advocate
Hughes Justice Complex
CN 850
Trenton, New Jersey 08625
Attorney for Wilfredo Carabello, Public Advocate, Amicus Curiae

Bernard K. Freamon, Esq.
1111 Raymond Boulevard
Newark, New Jersey 07102
Attorney for N.A.A.C.P., et al., Amici Curiae

On Appeal From;

That portion of the June 15, 1992 Opinion of the Appellate Division that affirmed the Resolution of the State Board of Education of the State of New Jersey of July 3, 1991 (Appellate Division, Docket Numbers A-6384-90T5F and A-6385-90T5F).

NOTICE is hereby given that the undersigned, counsel for the Board of Education of the Borough of Englewood Cliffs hereby moves for leave to appeal, pursuant to *R.* 2:2-4, from that portion of the June 15, 1992 Opinion of the Appellate Division that affirmed the Resolution of the State Board of Education of the State of New Jersey on July 3, 1991, regarding the conducting of a study of regionalization.

In support of this Motion movant shall rely upon the Appellate Division's Decision, the accompanying Petition For Certification, Statement Of Points To Be Raised On Appeal And Brief In Support Of Motion For Leave To Appeal On Behalf Of The Board Of Education Of The Borough Of Englewood Cliffs, Bergen County, and the briefs and Appendices submitted below.

Appendix A

HELLRING LINDEMAN GOLDSTEIN & SIEGAL
Attorneys for the Board of Education of the Borough of Englewood Cliffs

By: JOEL D. SIEGAL
A Member of the Firm

Dated: July 15, 1992

APPENDIX B — NOTICE OF MOTION FOR LEAVE TO APPEAL AND FOR A STAY, FILED BY RESPONDENT TENAFLY BOARD OF EDUCATION ON OR ABOUT JULY 15, 1992

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
Headquarters Plaza
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(201) 538-0800

Attorneys for Cross-Respondent/Respondent
Board of Education of the Borough of Tenafly, Bergen County

ON APPEAL TO THE SUPREME COURT

Civil Action

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner/Cross-Respondent/Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent/Cross-Petitioner/Cross-Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Cross-Respondent/Respondent.

Appendix B

NOTICE OF MOTION FOR LEAVE
TO APPEAL AND FOR A STAY

NOTICE IS HEREBY GIVEN that the Board of Education of the Borough of Tenafly, Bergen County, Cross-Respondent/ Respondent in the above-captioned appeal, moves before the Supreme Court of New Jersey for leave to appeal the decision entered in this cause on June 15, 1992 by the Appellate Division as to the regionalization study and to obtain a stay of same.

RIKER, DANZIG, SCHERER, HYLAND
& PERRETTI
Attorneys for Cross-Respondent/
Respondent
Board of Education of the Borough
of Tenafly, Bergen County
s/ James S. Rothschild, Jr.
James S. Rothschild, Jr.

DATED:

APPENDIX C — ORDERS OF THE NEW JERSEY SUPREME COURT GRANTING THE MOTIONS FOR LEAVE TO APPEAL, FILED ON NOVEMBER 5, 1992

SUPREME COURT OF NEW JERSEY
M-392 September Term 1992
35,501

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner-Respondent,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent-Respondent,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Respondent-Movant.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 2nd day of November, 1992.

s/Stephen W. Townsend
CLERK OF THE SUPREME COURT

Appendix C

SUPREME COURT OF NEW JERSEY
M-393 September Term 1992
35,501

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Petitioner-Movant,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent-Respondent,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Respondent-Respondent.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 2nd day of November, 1992.

s/Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX D — JULY 3, 1991 RESOLUTION OF THE NEW JERSEY STATE BOARD OF EDUCATION ORDERING A REGIONALIZATION STUDY

Board of Education of the Borough of Englewood Cliffs, Bergen County v. Board of Education of the City of Englewood, Bergen County v. Board of Education of the Borough of Tenafly, Bergen County and A.S. by her guardian *ad litem*, R.S. SB #37-88

STATE OF NEW JERSEY

State Board of Education

RESOLUTION

WHEREAS, in its decision of April 4, 1990, the State Board of Education recognized its responsibility to exercise its authority in the case presented to it by the parties so as to insure effectuation of the State's constitutionally derived policy with respect to segregation and racial imbalance in New Jersey's public schools; and

WHEREAS, in that decision, the State Board of Education found that the balance between the racial and national origin groupings at Dwight Morrow High School had deteriorated to such point that the State Board of Education would be denying its responsibility for proper implementation of the State's educational policies were it to fail to take such steps as necessary to correct the situation; and

WHEREAS, in that decision, the State Board of Education directed that certain measures be taken to correct the situation; and

Appendix D

WHEREAS, in that decision, the State Board of Education directed that the Commissioner of Education monitor the composition of the pupil population of Dwight Morrow High School so as to assess the effectiveness of the measures that had been directed by the State Board of Education; and

WHEREAS, that directive was embodied in the Administrative Order accompanying the State Boards decision which was executed on April 5, 1990, wherein the State Board of Education directed the Commissioner of Education to recommend in his first annual report made pursuant to the Administrative Order any additional measures to be taken at the time of his report; and

WHEREAS, in his first annual report to the State Board of Education made on June 5, 1991, the Commissioner of Education recommended that a regionalization study now be conducted to explore the potential for establishing a regional school district including Englewood Cliffs, Englewood and Tenafly; and

WHEREAS, the State Board of Education has considered all arguments submitted in response to the Commissioner's recommendation by the attorneys representing the district boards of education of the Borough of Englewood Cliffs, the City of Englewood and the Borough of Tenafly, and has considered public comment on this item; and

WHEREAS, the State Board of Education has considered the Commissioner's recommendation for a regionalization study; and

WHEREAS, no stay of the State Board's decision of April 4, 1990, has been sought or granted; and

Appendix D

WHEREAS, the State Board of Education believes that it is advisable to consider all potential configurations in exploring the potential for a regional school district so as to insure that the situation that was presented to the State Board will be corrected in the most reasonable, feasible and workable manner possible; now, therefore, be it

RESOLVED, that the State Board of Education accepts the Commissioner's recommendation that a regionalization study now be conducted to explore the potential for establishing a regional school district; and be it

FURTHER RESOLVED, that the study include all potential configurations K-12 which would achieve the State's policy by correcting, among other things, the imbalance of racial and national origin groupings at Dwight Morrow High School; and be it

FURTHER RESOLVED, that the State Board of Education direct the Commissioner to take all steps necessary to begin and complete this regionalization study as expeditiously as possible.

July 3, 1991

s/James A. Jones
President, State Board of Education

s/John Ellis
Secretary, State Board of Education

RN/ch:5/0550D

APPENDIX E — PETITIONER'S JUNE 2, 1993 SUBMISSION TO THE STATE BOARD OF EDUCATION REGARDING THE REGIONALIZATION STUDY

HELLRING LINDEMAN GOLDSTEIN & SIEGAL
Counsellors at Law

June 2, 1993

BY FAX

Mary C. Jacobson, Assistant Attorney General
Department of Law and Public Safety
Division of Law
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

Re: Board of Education of the Borough of Englewood Cliffs v. Board of Education of the City of Englewood v. Board of Education of the Borough of Tenafly

Dear Ms. Jacobson:

We will attend the meeting scheduled for 2 p.m. tomorrow at the Department of Education on behalf of Englewood Cliffs. This letter is sent in advance of the meeting to expresss our disagreement with a letter addressed to you from Englewood's counsel which we have just received by fax.

Englewood Cliffs believes that techniques such as freedom of choice and magnet programs directed at improving attendance from all districts would be essential to successfully achieving and maintaining better integrated schools. Consideration of such

possibilities accords with the order of the Appellate Division as well as the observations of the Justices at the argument before the Supreme Court. The consultants to whom Englewood objects may well have creative suggestions and valuable experience in these regards. If so, the Department should hear what they have to offer.

We would also respectfully submit that Englewood's letter violates the premise of the meeting — that counsel meet and conduct themselves on a non-adversarial basis. In light of that, the Department should give no substantive consideration to Englewood's argumentative letter.

Very truly yours,

s/Joel D. Siegal

JDS: bam

cc: (by fax)
Arnold Mytelka, Esq.
James S. Rothschild, Esq.
Honorable Zulima V. Farber
Bernard K. Freamon, Esq.

APPENDIX F — PART VI OF THE OPINION OF THE APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT, EXCERPTED FROM PETITIONER'S APPENDIX (pp. 68a-77a)

[68a]

* * *

VI

We turn next to Cliffs' contention that the State Boards' denial of severance violated its rights under Section 1 of the Fourteenth Amendment to the United States Constitution, which provides that:

> [69a] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [U.S. *Const.* amend XIV, § 1].

The Fourteenth Amendment proscribes discrimination on the basis of race and extends to all state action which distinguishes between its citizens solely in racial terms. *See e.g., City of Richmond v. J.A. Croson Co.*, 488 *U.S.* 469, 492-95, 109 *S.Ct.* 706, 720-21, 102 *L. Ed.* 2d 854, 880-82 (1989); *Davis v. City and County of San Francisco,* 890 F.2d 1438, 1445 (9th Cir. 1989), *cert. denied,* __U.S.__, 111 *S. Ct.* 248, 112 *L. Ed.* 2d 206 (1990). The parties here sharply disagree both as to the characterization of the State Board action and the level of judicial scrutiny to be applied under the Fourteenth Amendment. This is important because the nature

of a legislative classification directs the standard of review. *State v. Bulu*, 234 *N. J. Super.* 331, 343, 560 A.2d 1250 (App. Div. 1989).

Regulation of a fundamental right or disparate treatment of a suspect class is subject to strict scrutiny, meaning that it must further a compelling state interest and there must be no less-restrictive means to accomplish that goal. *City of Cleburne v. Cleburne Living Center*, 473 *U.S.* 432, 440, 105 *S. Ct.* 3249, 3254, 87 *L. Ed.* 2d 313, 320 (1985); *Massachusetts Bd. of Retirement v. Murgia*, 427 *U.S.* 307, 311-13, 96 *S. Ct.* 2562, 2566-67, 49 *L. Ed.* 2d 520, 524-25 (1976); *San Antonio Independent School District v. Rodriguez*, 411 *U.S.* 1, 16-17, 93 *S. Ct.* 1278,1287, 36 *L.Ed.* 2d 16, 33 (1973); *Brown v. City of Newark*, 113 *N.J.* 565, 573, 552 *A.*2d 125 (1989); *Barone v. Dep't of Human Services*, 107 *N. J.* 355, 365, [70a] 365, 526 *A.*2d 1055 (1987) (citing *Graham v. Richardson*, 403 *U.S.* 365, 91 *S. Ct.* 1848, 29 *L. Ed.* 2d 534 (1971)); *State v. Bulu, supra*, 234 *N.J.* Super. at 343-44, 560 *A.*2d 1250. Regulation which involves a semi-suspect class or which indirectly affects a fundamental right, is subject to an intermediate level of scrutiny, must further an important governmental interest and be substantially related to the achievement of that objective. *City of Cleburne v. Cleburne Living Center, supra*, 473 *U.S.* at 441, 105 *S. Ct.* at 3255, 87 *L. Ed.* 2d at 321; *Craig v. Boren*, 429 *U.S.* 190, 197, 97 *S. Ct.* 451, 457, 50 *L. Ed.* 2d 397, 407(1976);*Greenberg v. Kimmelman*, 99 *N.J.* 552, 565, 494 *A.*2d 294 (1985); *State v.Bulu, supra*, 234 *N.J.* Super. at 344, 560 *A.*2d 1250. In all other cases, the rational basis test applies, requiring only that there be some rational connection between the state action and the legitimate state interest sought to be achieved. *See Massachusetts Bd. of Retirement v. Murgia, supra*, 427 U.S. at 312, 96 *S. Ct.* at 2566, 490 *L. Ed.* 2d at 524; *Drew Associates of New Jersey, LP v. Travisano*, 122 *N.J.* 249, 258-59, 584 *A.*2d 807 (1991); *Barone v. Dep't of Human Services, supra*, 107 *N. J.* at 364-65, 526 *A.*2d 1055 (citing

Dandridge v. Williams, 397 *U.S.* 471, 90 *S. Ct.* 1153, 25 *L. Ed.* 2d 491 (1970)).

Cliffs naturally argues that strict scrutiny is required because it views the State Board's decision as "based upon the race of the Cliffs' student population and nothing else." According to Cliffs, what the State Board has done here is to "seize" children from across district lines on the basis of their race to avoid racial imbalance at DMHS. Such a characterization may apply to some case, but not the one before us. The sending-receiving side of this case is not a test of the right of the Commissioner and the State Board to force the exchange of students between districts which previously had no such policy among themselves. What is at issue here is a long-standing legal relationship between Cliffs and [71a] Englewood pursuant to which the children of Cliffs have crossed school district borders voluntarily over the last quarter century. It is Cliffs which seeks to alter that status quo. In order to do so, it must meet the requirements of *N.J.S.A.* 18A:38-13, which apply to all school districts seeking to sever a sending-receiving relationship. The statutory standards are not *per se* under attack here. Thus it is hard to follow Cliffs' argument as to "seizure" of children across district lines or the creation of any classification, let alone a suspect racial one.

What is at issue here is an administrative adjudication based upon legislatively mandated considerations including the intertwined concepts of the quality of education and the racial composition of the schools in question. Is it race conscious as Cliffs contends? The answer is yes. Is race consciousness prohibited? The answer is no. It is only the *per se* use of race as a determinant which creates a classification subject to strict scrutiny under the Fourteenth Amendment. *Porcelli v Titus*, 431 *F.*2d 1254, 1257 (3d Cir. *1970), cert. denied*, 402 *U.S.* 944, 91 *S. Ct.* 1612, 29

*L.Ed.*2d 112 (1971). The United States Constitution does not prohibit states from taking race into account in educational decisions. *Wygant v. Jackson Bd. of Educ.*, 476 *U.S.* 267, 106 *S. Ct.* 1842, 90 *L. Ed.* 2d 260 (1986). Our Supreme Court so concluded in *Morean v. Bd. of Educ. of Montclair, supra,* which is controlling here, and which found "no substance to the petitioners' contention that since its plan of relocation had some racial motivation it was violative of the fourteenth amendment." 42 *N.J.* at 243, 200 *A.2d* 97. *See also Schults v. Bd. of Educ. of Teaneck,* 86 *N.J.* Super. 29, 40-41, 205 *A.*2d 762 (App. Div. 1964), *aff'd,* 45 *N.J.* 2, 210 *A.*2d 762 (1965).

Cliffs' reliance on *City of Richmond v. J.A. Croson Co., supra, Wygant, supra,* and *Regents of the University of California v.* [72a] *Bakke,* 438 *U.S.* 265, 98 *S. Ct.* 2733, 57 *L. Ed.* 2d 750 (1978), a series of recent United States Supreme Court decisions which invalidated true racial classifications, is misplaced. In *Bakke, supra,* a white medical school applicant was denied the opportunity to compete for 16 seats of the entering class *solely* because of his race. 438 *U.S.* at 272-79, 98 *S. Ct.* at 2734-42, 57 *L. Ed.* 2d at 759-64. In *City of Richmond v. J.A. Croson Co., supra,* whites were denied the opportunity to compete for a fixed percentage of public contracts *solely* because of their race. 488 *U.S.* 478-82, 109 *S. Ct.* at 713-15, 102 *L. Ed.* 2d at 871-75. In *Wygant v. Jackson Bd. of Educ., supra,* there was a preferential layoff system in which minority teachers were retained over non-minority tenured teachers *solely* because of their race. 476 *U.S.* at 269-72, 106 *S. Ct.* at 1845, 90 *L. Ed.* 2d at 266-67. In an effort to analogize this case to the cited precedent, Cliffs argues that the "State Board attempted to reserve places for whites at DMHS in order to reduce minority representation." This is a distortion of what actually occurred. No amount of ingenuity can bring this case within the interdiction of *Bakke, Wygant* and *Croson* which

involved absolute racial preferences in a zero-sum context. Indeed, a majority of Justices in *Bakke* specifically concluded that to achieve diversity, race is an appropriate consideration in school admission decisions. 438 *U.S.* at 318-20, 98 *S.Ct.* at 2762-63, 57 *L. Ed.* 2d at 788-90 (Powell, J.); *Id.* at 324-25, 98 *S.Ct.* at 2765-66, 57 *L. Ed.2d* at 792-93 (Brennan, White, Marshall and Blackmun, JJ., concurring). In *Lige v.Town of Montclair,* 72 *N.J. 5,* 367 *A.*2d 833 (1976), our Supreme Court unambiguously explained the difference between a quota issue and the matter under review:

> It is important to recognize the difference between rectifying a racially improperly constituted school, *Jenkins v. Tp. of Morris School District and Bd. of Ed.,* 58 *N.J.* 483 [279 [73a] *A.*2d 619] (1971), for no one has a right to attend a segregated school; whereas an applicant for a job or a promotion has a right to be considered and judged irrespective of race. [72 *N.J.* at 24, 367 *A.*2d 833].

If a classification exists here at all, which we doubt, it is not racial but geographic — all Cliffs' students are involved equally. The designated public high school for Cliffs' residents remains DMHS, and the injunction precludes other public school boards from accepting any Cliffs' student, regardless of race. Conversely, the injunction does not preclude other public school boards from accepting, for tuition, students who reside outside of Cliffs and Englewood. As such, the standard to be applied is a rational basis standard which requires only that there be some reasonable connection between a legitimate state interest and the action taken. *See Drew Associates, supra,* 122 *N.J.* at 258-59, 584 *A.*2d 807; *Barone v. Dep 't of Human Services, supra,* 107 *N. J.* at 364-65, 526 *A.*2d 1055.

Appendix F

Even if we were to concede that the State Board's decision constitutes a race-based classification with respect to white Cliffs' students, that remedy would still pass constitutional muster. The State's compelling interest in diversity in the public schools *as a function of education* cannot be seriously questioned. *Jenkins, supra,* 58 *N.J.* at 498-99, 279 *A.*2d 619 (citing *Booker, supra,* 45 *N.J.* at 170-71, 212 *A.*2d 1). Concomitantly, the State's interest in "assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice" is beyond dispute. *City of Richmond v. J.A. Croson Co., supra,* 488 *U.S.* at 492, 109 *S.Ct.* at 720, 102 *L. Ed. 2d* at 881 (comparing *Norwood v. Harrison,* 413 *U.S.* 455, 465, 93 *S. Ct.* 2804, 2810, 37 *L. Ed.* 2d 723, 731(1973)). The only question then is whether the [74a] decision is as narrowly tailored as it could be; was it the least restrictive means to accomplish the goal?

Cliffs contends that the State Board's action was overbroad because it ordered an inter-district remedy even though no inter-district violation had been found, contrary to *Milliken v. Bradley,* 418 *U.S.* 717, 94 *S. Ct.* 3112, 41 *L. Ed.* 2d 1069 (1974). This argument misapprehends *Milliken.* There the Supreme Court struck down a remedy imposed by the District court to relieve *de jure* school discrimination in Detroit. The District Court had ordered a consolidation of Detroit and 53 suburban school districts because it had determined that a Detroit-only remedy would not alleviate the effects of the segregation. *Id.* at 729-34, 94 *S. Ct.* at 3119-22, 41 *L. Ed.* 2d at 1082-85. There was no evidence of any discrimination in the suburban districts. While Cliffs is correct when it contends that *Milliken* limits inter-district relief to inter-district violations, it errs in its attempt to apply that holding to this case. *Milliken* did nothing more than define the limits of a federal court's equity jurisdiction; the decision did not circumscribe in any way a state's authority to effectuate its own educational policies.

Indeed, as the Supreme Court stated in *Hills v. Gautreaux*, 425 *U.S.* 284, 296, 96 *S. Ct.* 1538,1545, 47 *L. Ed.* 2d 792, 802-03 (1976):

> The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a *judicial decree* restructuring the operation of local governmental entities that were not implicated in any constitutional violation. [Emphasis added].

[75a] The same reasoning is applicable to Cliffs' reliance on the recent United States Supreme Court decision in *Freeman v. Pitts*, 503 *U.S.* __, 112 *S. Ct.* 1430, 118 *L. Ed.* 2d 108 (1992). Like *Milliken, Freeman is* a study of the limits of a federal court's continuing supervisory authority over a court-ordered plan to combat *de jure* segregation. *Freeman* addressed the margins of federal court authority where *de jure* segregation has undergone a period of transition to *de facto* segregation. *Freeman v. Pitts*, 503 *U.S.* at __, 112 *S.Ct.* at 1447,118 *L. Ed.* 2d at 136 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 *U.S.* 1, 31-32, 91 *S. Ct.* 1267,1283-84, 28 *L. Ed.* 2d 554, 575 (1971)). In the federal jurisdiction context, this is an important issue because federal courts are powerless to remedy *de facto* segregation. *See Freeman v. Pitts*, 503 *U.S.* at __, 112 *S. Ct.* at 1443-48, 118 *L. Ed.* 2d at 136-39; *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 *U.S.*__, __, 111 *S. Ct.* 630, 637-38, 112 *L. Ed.* 2d 715, 728-30 (1991); *Pasadena City Bd. of Educ. v. Spangler*, 427 *U.S.* 424, 436, 96 *S. Ct.* 2697, 2704, 49 *L. Ed.* 2d 599, 608 (1976). Nothing in *Milliken* or *Freeman* suggests that the limits there expressed are applicable to judgments of the highest state educational authority

as to how to carry out longstanding state policies in favor of racial balance as a function of a thorough and efficient educational system. Whatever the Federal Constitution compels, it does not preclude such action by the State. *Jenkins, supra,* 58 *N. J.* at 498-99, 279 *A.*2d 619. Further, it is clear that the State Board here has applied the least intrusive remedy. It has not yet required consolidation of two unrelated districts; it has only enforced a long-standing voluntary, preexisting inter-district relationship.

Moreover, and notwithstanding that a particularized finding of intentional discrimination is not a prerequisite for state remedies for racial imbalance, *Jenkins, supra,* 58 *N.J.* at 506, 279 *A.*2d 619; *Booker, supra,* 45 *N.J.* at 170-78, 212 *A.*2d 1, such findings are the [76] leitmotif which runs throughout the decisions here. The Commissioner and the State Board clearly found that Cliffs' residents had engaged in white flight from DMHS, which flight was facilitated by the Tenafly Board's private tuition policy and by the Cliffs Board. As the Commissioner noted: "[n]o one could seriously believe that racial prejudice and circumvention of integration is not at play in this case." Likewise, the State Board concluded that to deny relief here would be to make the State a "passive participant" in private *discrimination.* No more specific findings are required. Under the circumstances, the State Board's action clearly passes strict scrutiny; it goes without saying that the lesser burdens are also met.

We turn next to Cliffs' New Jersey constitutional claim. Article I, paragraph 1 of the State Constitution protects against the unequal treatment of those who should be treated alike. *Barone v. Dep't of Human Services, supra,* 107 *N.J.* at 367, 526 *A.*2d 1055 (quoting *Greenberg v. Kimmelman, supra,* 99 *N.J.* at 568, 494 *A.*2d 294). When analyzing equal protection claims under the New Jersey Constitution, a balancing test similar to a Fourteenth

Amendment analysis is applied. *Barone*, 107 *N.J.* at 368, 526 *A.*2d 1055. The weights in the balance are the nature of the affected right, the extent to which the government's restriction intrudes upon it and the public's need for the restriction. *Greenberg v. Kimmelman, supra*, 99 *N.J.* at 567, 494 *A.*2d 294; *State v. Bulu, supra*, 234 *N.J. Super.* at 344, 560 *A.*2d 1250. In describing the application of the analysis under the State Constitution, our Supreme Court has said that the focus is on "whether there is an appropriate governmental interest suitably furthered by the differential treatment" embodied in the action complained of. *Barone, supra*, 107 *N.J.* at 368, 526 *A.*2d 1055 (quoting *Borough of Collingswood v. Ringgold*, 66 *N.J.* 350, 370, 331 *A.*2d 262 (1975), *appeal dismissed*, 426 *U.S.* 901, 96 *S.Ct.* 2220, 48 *L. Ed.* 2d 826 [77] (1976)). For the same reasons that we have rejected Cliffs' Fourteenth Amendment claim, we view its New Jersey constitutional analogue as insubstantial. As we have said, our State's education policy is advanced by the State Board's decision here which is a measured response to the problem presented.

It should not go unsaid that we agree with Englewood and the *amici* that Cliffs' invocation of the Fourteenth Amendment here turns that constitutional provision "on its head." The Fourteenth Amendment and its New Jersey counterpart are meant to shield our citizens against state sanctioned racial discrimination. To suggest that they prohibit a state from applying a statute, specifically addressed to remedying the educationally pernicious evils of white flight, racial imbalance, and *de facto* segregation in the schools is, at best, cynical.

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No. 93-373

In The

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD AND THE STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

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TABLE OF CONTENTS

	Page
Further Reasons for Granting the Writ	1
I. The Decision Sought to Be Reviewed Is a Final Decision	1
II. Cliffs Has Standing to Bring the Petition	3
III. The Case Presents Important, Recurring Issues as to What Race-Conscious Actions Are Permissible Under the Fourteenth Amendment	8
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Akron Board of Education v. State Board of Education of Ohio, 490 F.2d 1285 (6th Cir. 1974), *cert. denied*, 417 U.S. 932 (1974)	4, 5
Avery v. Midland County, 390 U.S. 474 (1968)	2, 3
Board of Education v. Allen, 392 U.S. 236 (1968)	4, 6
Bradley v. School Board of City of Richmond, Virginia, 338 F. Supp. 67 (E.D.Va. 1972), *rev'd on other grounds*, 462 F.2d 1058 (4th Cir. 1972), *aff'd sub nom. School Board of City of Richmond, Virginia v. State Board of Education*, 412 U.S. 92 (1973)	5

Contents

	Page
Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956)	6
City of Newark v. New Jersey, 262 U.S. 192 (1923)	6
City of Trenton v. New Jersey, 262 U.S. 182 (1923)	6, 7
Clowes v. Terminix Int'l Inc., 109 N.J. 575, 538 A.2d 794 (1988)	9
Hull v. Quitman County Bd. of Education, 1 F.3d 1450 (5th Cir. 1993)	8
Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 566 A.2d 229 (App. Div. 1989)	9
McKesson v. Division of Alcoholic Beverages, 496 U.S. 18 (1990)	4
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1947)	2
Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979)	7
School Board of the City of Richmond, Virginia v. Balliles, 829 F.2d 1308 (4th Cir. 1987)	4, 5
Williams v. Baltimore, 289 U.S. 36 (1933)	6

Contents

Page

Statutes Cited:

28 U.S.C. § 1257(a) 1, 3

N.J.S.A. 18A:38-13 ..... 7, 8

United States Constitution Cited:

Fourteenth Amendment 4, 6, 8, 10

Rule Cited:

New Jersey Rules of Court, R. 2:2-1 1

FURTHER REASONS FOR GRANTING THE WRIT

I. THE DECISION SOUGHT TO BE REVIEWED IS A FINAL DECISION

Respondents present no serious challenge to the finality of the New Jersey Superior Court's decision under Article III or 28 U.S.C. § 1257(a). When the administrative proceeding began, the Board of Education of the Borough of Englewood Cliffs ("Cliffs") sought *severance* of its sending-receiving relationship with the Board of Education of the City of Englewood ("Englewood"). Englewood cross-petitioned for an *injunction* against Cliffs and Englewood students attending Tenafly High School, and for *immediate regionalization* of the three high school districts. All three of these issues have been finally decided. The Appellate Division affirmed the State Board of Education's decision denying Cliffs' request for severance, denying Englewood's request for regionalization and instituting an injunction. The Supreme Court of the State of New Jersey affirmed these final decisions.

A year after it ruled on the pending matters, the State Board of Education voted by resolution (rather than by an order in this case), to pursue a study of the potential for forming a regional district. *See* Appendix D to Englewood's Brief in Opposition. The regional district could include but would not necessarily be limited to high schools and could, but would not necessarily, include Tenafly and Cliffs. *Id.* at 11a. Cliffs appealed this and the New Jersey Supreme Court found such a study authorized.[1] Appendix A

1. In bringing its appeal to the New Jersey Supreme Court, Cliffs filed a Notice of Appeal on July 15, 1992, on the specific grounds that the decision constituted a final decision which violated constitutional rights (*see* New Jersey Rules of Court R. 2:2-1). In addition, Cliffs filed a Petition for Certification on July 15, 1992 (an application for discretionary review of a final judgment involving non-constitutional issues in the case) (*see id.*). Cliffs also filed a (Cont'd)

to Petition at 3a. Thus, the issue of whether a regionalization study will take place has also been finally decided by the New Jersey courts.

All the issues that were before the New Jersey courts have therefore been decided. No part of the controversy remains for the state courts to address. The state courts did not retain jurisdiction; the New Jersey Supreme Court's decision was thus the last judicial act in this litigation and "final." *Avery v. Midland County*, 390 U.S. 474, 478 n.2 (1968).

What may or may not happen, if and when the regionalization study is completed, has no bearing on the finality of the New Jersey Supreme Court's decision. The constitutional violation that the orders it affirmed inflicts will continue without redress regardless of how the study concludes. If the study results at some date in some regionalization order from the State Board — the form of which one could not today even guess at — or if regionalization is found undesirable — as previously held by the ALJ, Commissioner and State Board — any such order may engender a *new* legal proceeding. It would not be part of *this* case.

The primary case relied upon by the Respondents, *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1947), is inapposite here. There the issue of liability had been determined, but the issue of a remedy remained possibly undecided. In this case, unlike *Republic Natural Gas*, the state courts have made their final decision, including remedies: to deny severance, to enjoin private

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(Cont'd)
motion for leave to appeal from the order of the Appellate Division as it related to the regionalization study, describing the filing as a precautionary measure. *See* Petition to Enlarge Time to File Motion for Leave to Appeal, dated June 30, 1992 at ¶ 3. Englewood in fact filed a Notice of Cross-Appeal, July 27, 1993, regarding regionalization evidencing its belief that the decisions were final. The New Jersey Supreme Court never struck the notice of appeal nor ruled that any issue in the case was non-final.

tuition, to deny regionalization and to affirm the decision to study the issue. Instead, this case more closely resembles that of *Avery v. Midland County, supra.* In *Avery* the Supreme Court of Texas had ruled that population does not strictly govern the apportionment of seats on the "Commissioner's Court," a local governmental body. The Texas Supreme Court did not state how the apportionment of the seats on the Commissioner's Court should be made, and instead directed the Commissioner's Court to determine the redistricting itself within the general constitutional boundaries delineated by the Texas Supreme Court. This Court found that judgment to be final despite the fact that the order required ongoing proceedings in the Commissioner's Court to effect reapportionment, which could lead to further court challenge when completed. Very simply, despite the ongoing administrative proceedings, ". . . the Texas Supreme Court opinion contemplated no further proceedings in the lower courts. . . ." *Id.*, 390 U.S. at 4778 n.2. For the same reasons, the decision of the New Jersey Supreme Court in this case is final and ripe for review under Article III and 28 U.S.C. § 1257(a).

II. CLIFFS HAS STANDING TO BRING THE PETITION

Respondents challenge to standing is equally inapposite. A school board, such as Cliffs, has Article III standing to challenge state action on federal equal protection grounds, where that action both (1) violated the equal protection rights of pupils and parents within Cliffs' school district, and (2) affects directly the schools of the district which the board is charged with operating. This exact issue was raised by the Board of Education of the City of Englewood before the Superior Court, Appellate Division and Supreme Court of the State of New Jersey. The New Jersey Supreme Court requested and received supplemental letter memoranda from the parties on just this issue. Both courts ultimately ruled on the federal constitutional issue in this matter on the merits, implicitly finding that Cliffs had standing to assert such

issues. There is no reason to disturb the standing accorded by the decisions below during this continuation of the state court proceedings. *Cf. Board of Education v. Allen*, 392 U.S. 236 (1968) (standing before the New York courts continued in this Court); *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 30 (1990) ("... when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case 'whoever may be the parties to the original suit. . . .' ") (citations omitted).

Leading cases of this Court and the several United States Courts of Appeals support granting standing to Cliffs. This Court has found standing for a school board to sue its "creator," the State of New York, to challenge school textbook policies as violative of the equal protection guaranty in *Board of Education v. Allen, supra,* because, the Court found, its board members had a personal stake in upholding their oaths to support the United States Constitution. 392 U.S. at 241 n.5.

In *Akron Board of Education v. State Board of Education of Ohio*, 490 F.2d 1285 (6th Cir. 1974), *cert. denied,* 417 U.S. 932 (1974), the Court held that a municipal board of education had standing to challenge state action on federal equal protection grounds. Acknowledging that the Fourteenth Amendment to the United States Constitution protects "citizens" and hence the rights at issue belonged to the pupils and parents within the jurisdiction of the board, the court found that the school board had a sufficiently close relationship with its pupils and their parents to assert their rights. *Id.* at 1289. The court also recognized, as an independent basis for standing to assert these equal protection rights, that the same state action giving rise to the alleged violation of the equal protection rights of the district's pupils and their parents would also result in direct harm to the school district. *Id.* at 1289-1290.

The court in *School Board of the City of Richmond, Virginia v.*

Balliles, 829 F.2d 1308 (4th Cir. 1987), relying on the same grounds as *Akron*, held the Richmond School Board had standing to assert the equal protection rights of its students. *Id.* at 1311. The underlying district court decision which the Fourth Circuit thus reaffirmed, *Bradley v. School Board of City of Richmond, Virginia*, 338 F. Supp. 67 (E.D.Va. 1972), *rev'd on other grounds*, 462 F.2d 1058 (4th Cir. 1972), *aff'd sub nom. School Board of City of Richmond, Virginia v. State Board of Education*, 412 U.S. 92 (1973), had stated in this regard:

> . . . were school boards not to be accorded standing, serious deprivations to constitutional rights might occur, especially in situations wherein individual plaintiffs might well lack the resources to bring and maintain the type of mammoth lawsuit involved.

Id., 338 F. Supp. at 230.

As these cases make clear, Cliffs has standing to challenge state action based on the federal equal protection rights of the pupils and their parents within its district. Cliffs is charged with the duty to oversee the public education of its school-age population and has the same clear and close relationship to the parents and pupils of its district as in the *Akron* and *Richmond* cases. Indeed, the State Board previously has voiced its agreement with this position:

> . . . the State Board acknowledges that the local boards in this case share an identity of interests with the individuals subject to their jurisdiction. This commonality of purpose is one reason why the boards have standing to assert their claims. *See Akron Board of Ed.*, 490 F.2d at 1289. Moreover, if "each governmental

> entity is *parens patriae* within the orbit of its own political responsibility," *Bergen County v. Port of N.Y. Authority*, 32 N.J. 303, 311 (1960), then in this case the local boards are the appropriate litigants to pursue district interests.

See April 5, 1993 Letter Memorandum to the New Jersey Supreme Court on behalf of the State Board of Education at 8-9. Cliffs is thus an appropriate party to assert that population's right to be free of state policies making race-conscious determinations of where pupils will attend school, which Cliffs believes violate the Fourteenth Amendment. *See also, Board of Education v. Allen, supra; Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 104-105 (8th Cir. 1956).

As in *Akron* and *Richmond*, Cliffs also suffers direct injury from the state orders, especially the injunction. The existence of other public high school districts as alternatives to Dwight Morrow High School ("DMHS") in Englewood has been critical to Cliffs' ability to retain students in the Cliffs Upper School who would otherwise withdraw at an earlier age to secure places for themselves in academically superior private institutions, resulting in the loss of students, programs and faculty for the Cliffs' district schools. Pa370, 431, 602, 603; 1/13T110-11, 113, 117-118; 1/18T146-149; 1/14T176-190, 193-194.

City of Trenton v. New Jersey, 262 U.S. 182 (1923), *City of Newark v. New Jersey*, 262 U.S. 192 (1923), and *Williams v. Baltimore*, 289 U.S. 36 (1933), upon which the State Board and Englewood rely, as well as the lower court cases cited by Respondents, are all distinguishable, because each involved a government entity suing to vindicate its *own* alleged constitutional rights, not, as here, a government entity suing to vindicate the constitutional rights of the individuals it closely represents. Moreover, Respondents cite these cases for the general proposition that the state may do whatever it wants to its municipalities, but

that ruling is inapposite here, where the state's statutory framework specifically provided the local government entity with rights. N.J.S.A. 18A:38-13 provided for the Cliffs *Board* to be the petitioner, and to address germane issues, including racial balance. N.J.S.A. 18A:38-13 thus gives the Cliffs Board an autonomous role to play vis-a-vis the State similar to the local school board's autonomous role that was recognized in *Rogers v. Brockette*, 588 F.2d 1057, 1066-1067 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979). The State may not be obliged to organize itself that way, but having done so it has conferred standing on Cliffs to assert federal claims against the State. *Id.* at 1069-1070. *Rogers* directly rejects the interpretation of *City of Trenton* proposed here by the State and Englewood. 588 F.2d at 1069.

If Cliffs' arguments cannot be considered because it does *not* have standing, then no injunction should have been issued at all because the persons affected by the injunction — the pupils and their parents — were not before the tribunal. Entry of any order against the non-parties would operate as a denial of due process unless Cliffs is to be deemed an adequate representative of their interests — including the federal equal protection rights of Cliffs' pupils and their parents. In fact, from the outset of this litigation, the administrative agency limited the representation of the constitutional rights of the pupils and their parents implicated in this litigation to the school board parties. The ALJ made an initial determination to exclude proposed individual intervenors based on the Board of Education of the Borough of *Tenafly's* ability to represent the constitutional interests of the parents of its *Englewood* resident private tuition pupils. *See* Appendix to March 30, 1993 Letter Brief of Cliffs to the New Jersey Supreme Court. It must therefore be assumed that *Cliffs* has the standing to represent the interests of the pupils and their parents of its *own* district.[2] If the

2. It should be noted that in raising an equal protection argument on behalf of the pupils of its district and their parents, Cliffs is doing nothing differently (Cont'd)

school boards lacked standing to assert the equal protection arguments of their constituents, while the would-be intervenors, students and parents were excluded from participation, then the entire proceedings denied due process to the unrepresented parties.

For the foregoing reasons, Cliffs has standing in this Court to challenge the State's actions on federal equal protection grounds.

III. THE CASE PRESENTS IMPORTANT, RECURRING ISSUES AS TO WHAT RACE-CONSCIOUS ACTIONS ARE PERMISSIBLE UNDER THE FOURTEENTH AMENDMENT

Respondents have said little of substance on the merits, painting in broad and at times illogical strokes. They argue, for example, that Cliffs has not explained why it did not attack N.J.S.A. 18A:38-13 on its face for having included effect on racial balance as one element among many for the Commissioner of Education to consider in regard to applications for severance. The reason for this is that Cliffs does not contend that all race-conscious actions are invalid, but rather that the interest in taking race-conscious actions must be compelling, and the actions taken both necessary and narrowly tailored to the State's interest. *See* Petition at 21 and *passim*. Such a showing has not been made here.

In particular, one state interest urged is to avoid a small percentage change in the white student percentage at DMHS — 1.6% when the Petition was under review, 6% when Tenafly adopted its private tuition program — but that interest is not compelling. *See Hull v. Quitman County Bd. of Education*, 1 F.3d 1450, 1456 (5th Cir. 1993) ("The possible reduction from 10% to a

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(Cont'd)
than what Englewood has done in raising equal protection claims in support of its regionalization arguments and in support of its request for an injunction.

5% white student population, while regrettable, imposes no significant detriment to the pre-existing potential for desegregation. Conversely, taking costly steps to try to retain the additional 5% of white students . . . could achieve only a pyrrhic victory in a virtually all black school system.") Indeed, Englewood has the means to achieve substantial integration from its own diverse community. *See* 205a, 235a.

Recognizing the *de minimus* nature of the asserted interest under these circumstances, Respondent Englewood attempts to portray the case inaccurately as involving a "remedy" for *de jure* segregation rather than the pursuit of an affirmative policy of altering *de facto* racial balances. Despite Respondents' constant attempts to do so, they did not present any concrete evidence of *de jure* segregation in this matter, relying instead upon the anecdotal hearsay evidence of possible prejudice of a few individual students, which the ALJ, who was the only individual or body that saw the witnesses and heard the testimony over 99 days of hearings, declined to credit.[3] Respondents have conspicuously failed to present any specific evidence of policies, programs or actions by the Cliffs Board having the intent or purpose to segregate either Cliffs or DMHS. Englewood's arguments notwithstanding, neither the Commissioner nor State Board entered any finding contrary to the ALJ who concluded that (1) DMHS's racial imbalance resulted from *de facto* conditions; (2) neither Cliffs nor Tenafly practiced any intentional discrimination; and (3) Cliffs' petition for severance had been motivated by good faith educational concerns. 228a-229a, 251a-252a, 132a.

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3. Despite Englewood's attempt to write off the ALJ's findings as subject to *de novo* review, on issues of intent and motivation, deference must be given to the ALJ who heard the testimony of the witnesses and could assess credibility. *Clowes v. Terminix Int'l Inc.*, 109 N.J. 575, 587-538, 538 A.2d 794, 800 (1988); *Matter of Tenure Hearing of Tyler*, 236 N.J. Super. 478, 485, 566 A.2d 229, 233 (App. Div. 1989).

This case thus presents this Court with important, recurring issues as to what race-conscious "affirmative actions" are permissible under the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, as well as those expressed in Cliffs' Petition, this Court should grant Cliffs' Petition for a Writ of Certiorari.

Respectfully submitted,

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